Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CROW TRIBE OF INDIANS, MONTANA
MARCUS L. NANCE, NANCE CATTLE CO.,
PEABODY COAL CO., THERMAL ENERGY, INC.,
WESTMORELAND RESOURCES, INC.,
Petitioners

v.

EVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Was it not arbitrary and capricious for the Environmental Protection Agency to ignore Indian tribe and coal mining company objections to the designation of a Class I area under the Clean Air Act on the theory that the designation would not affect coal mining under its then-current regulations, where EPA had reason to know when it acted that coal mining would be adversely affected by the designation under the 1977 Amendments to the Act which had already passed both houses of Congress and were awaiting Presidential signature?

2. Where the principal impact of the Class I designation on petitioners' mining operations will occur in the future, do not the preclusion of judicial review provisions of the 1977 Clean Air Act Amendments require the Court of Appeals to remand the proceedings to the Environmental Protection Agency for consideration of the effect which the 1977 Amendments would have on surface coal mining near the Northern Cheyenne Reservation?

3. Did the Environmental Protection Agency breach the federal government's fiduciary obligations to the Crow Tribe of Indians in approving the redesignation of a clean air area adjacent to Crow Tribe land without considering the objections of the Crows that the redesignation would adversely affect their ability to mine coal on their land?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Amax Coal Co.

Crow Tribe of Indians, Montana

Environmental Protection Agency

ITT Resources

*Montana Power Co.

Marcus L. Nance

Nance Cattle Co.

Northern Cheyenne Tribe

*Pacific Power & Light Co.

†Peabody Coal Co.

*Portland General Electric Co.

*Puget Sound Power & Light Co.

†Thermal Energy, Inc.

*Washington Water Power Co.

†Westmoreland Resources, Inc.

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* Parties dismissed after settlement agreement.

† Peabody Holding Co., Washington Energy Co., and Westmoreland Coal Co. are the parent companies of petitioners Peabody Coal Co., Thermal Energy, Inc., and Westmoreland Resources, Inc., respectively. Penn-Virginia Corp. is an affiliate of Westmoreland Coal Co. and Westmoreland Resources, Inc.

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WESTMORELAND RESOURCES, INC.,
Petitioners

v.

EVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Crow Tribe of Indians, Montana, Marcus L. Nance, Nance Cattle Co., Peabody Coal Co., Thermal Energy, Inc. and Westmoreland Resources, Inc. pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 645 F.2d 701 (9th Cir. 1981) and appears at pp. 1a-35a of the Appendix. The decision of the Environmental Protection Agency Administrator was published at 42 Fed. Reg. 40,695 (1977), was codified at 40 C.F.R. § 52.1382 (1980), and appears at pp. 36a to 45a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1981 and appears at p. 31a of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

This case raises questions concerning the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), both before and after the enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977), and concerning EPA's interpretation of the Act. The Clean Air Act, as amended, is now codified at 42 U.S.C. §§ 7401-7642 (Supp. III 1979). The text of the Act, in pertinent part, is set out in the Appendix at pp. 46a-66a.

EPA's regulatory interpretations of the Act are set forth in the Code of Federal Regulations, 40 C.F.R. § 52.21 (1977); and 40 C.F.R. § 51.24 (1980), as amended by 45 Fed. Reg. 52,729-35 (1980). The text of these regulations, in pertinent part, is set out in the Appendix at pp. 82a-106a.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1976) provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> • • • • •
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law.

STATEMENT OF THE CASE

In 1976, the Northern Cheyenne Tribe of Indians proposed to tighten the air quality classification of its reservation from Class II to Class I under the Environmental Protection Agency's (EPA's) 1974 Prevention of Significant Deterioration (PSD) regulations.[1] The Chairman of the Crow Tribe and the surface mining

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[1] 40 C.F.R. § 51.24 (1977). The PSD Programs involved in this litigation were designed to prevent significant deterioration of air quality in areas already meeting the National Ambient Air Quality Standards (NAAQS). *See generally* Terziev, *PSD: New Regulations and Old Problems*, 5 HARV. ENVT'L. L. REV. 130 (1981). EPA's 1974 PSD Program was court-mandated. The Clean Air Act was then amended to incorporate a statutory PSD program in 1977. Major new and modified sources, as now defined in the Clean Air Act, located in areas which comply with the NAAQS (attainment areas) must show that they will not contribute to a violation of either a NAAQS or exceed the increment by which levels of particulate matter or sulfur dioxide (SO_2) may increase over pre-existing or "baseline" levels. EPA's PSD regulations employ a classification system under which all attainment areas originally were designated Class II. Class II designation permits moderate increases in particulate matter and SO_2 concentration above the pre-existing levels. States, federal land managers and Indian governing bodies were empowered to redesignate their territories as either Class I or Class III subject to the approval of EPA. A Class I designation would permit substantially smaller increases in air pollution than would a Class II designation. Consequently, few if any new industrial facilities could be constructed in or near a Class I area. A Class III designation would permit increases up to the NAAQS.

petitioners objected to EPA's approval of this reclassification because of a concern that the proposed stringent Class I requirements would unduly limit their ability to mine coal on nearby coal land owned or leased by them. The Northern Cheyenne Tribe and EPA dismissed petitioners' objections, taking the position that EPA's then-current PSD regulations, promulgated under the existing Clean Air Act, would not affect mining operations. Before EPA finally approved the Northern Cheyenne redesignation in 1977, however, Congress had passed and sent to the President amendments to the Clean Air Act which EPA has interpreted in its 1980 PSD regulations to expand the PSD program to constrain seriously coal mining operations like those of petitioners.

Petitioners had argued to EPA that the reclassification would affect their operations under these pending statutory amendments, and had requested deferral of EPA action on the redesignation. Comments of Westmoreland Resources, Inc. to EPA (May 25, 1977), App. at 112a. Nonetheless, even when presidential signature on the 1977 Amendments was imminent, EPA continued to insist that "strip mines . . . would not be directly affected by a redesignation." 42 Fed. Reg. 40,695, 40,697 (1977). The redesignation took effect on a Friday afternoon, two days before the 1977 Amendments were signed by the President. Thus, petitioners were and are faced with having a Class I area neighboring their coal lands and with EPA's interpretation of the 1977 Amendments. Contrary to EPA's assurances in 1977, the Class I designation does, under the Agency's current interpretation of the Amendments, have serious adverse consequences on petitioners' operations.

In the course of the redesignation approval process, EPA not only ignored the objections of Indian and non-Indian surface mining petitioners that they would be affected; it also relied on technicalities to disclaim any

fiduciary obligation to the affected Crow Tribe to look at the actual impacts on them. EPA found that a protest of the Crow Tribal Chairman and of the attorney for the Crow Tribe was not a protest of the Tribe itself requiring review of tribal objections on the merits. 42 Fed. Reg. 40,697 (1977). Moreover, EPA ignored the request of Undersecretary Joseph of the Department of the Interior that EPA review the redesignation on the merits to insure that the responsibility of the United States to the conflicting interests of the Crow and Northern Cheyenne Tribes would be met. Letter from James A. Joseph, Undersecretary of the U.S. Department of the Interior, to Douglas Costle, EPA Administrator (June 23, 1977), App. at 113a.

The Court of Appeals found that "[a]s a result of the letters from the Undersecretary of the Interior, and the Crow Tribe, and the failure of EPA to respond to those letters before approving the redesignation, the responsibility to exercise those fiduciary obligations is fairly placed upon the EPA." 645 F.2d at 711. The court also found that EPA, in ignoring the Tribe's objections to the proposed redesignation, had not breached the government's fiduciary obligation to the Crow Tribe only because the Agency insisted that the Crows would not be adversely affected by the Class I designation. The court below sustained EPA's approval of the redesignation over surface mining petitioners' and Tribal objections even though it found that "[t]he conclusion is . . . compelled that on the date the EPA finally approved the redesignation, it *knew* that the 1977 Clean Air Amendments would be passed and signed into law." App. at 11a; 645 F.2d at 707, 708 (9th Cir. 1981) (emphasis added).

While petitioners are now seriously constrained in their mining activities by the Class I designation, even more serious harm may be suffered by them in the

future. Because the judicial review provisions of the Clean Air Act may preclude a later review of the Class I designation, important questions of the timing of the review of the redesignation under the Clean Air Act Amendments and the discharge of the government's fiduciary obligations to the Crow Tribe are presented by these rulings. They require resolution by this Court if petitioners are not to be deprived of the right to mine coal on their lands without the protections of a rule-making proceeding in which the actual impacts of the redesignation on energy development are fully considered by EPA.

REASONS FOR GRANTING THE WRIT

EPA's approval of the Class I redesignation on the ground that it "would not" affect petitioners under existing law, when EPA had good reason to believe that petitioners would be affected under the already enacted 1977 Amendments to the Clean Air Act, contrasted with EPA's later interpretation of the 1977 Amendments which constrain mining substantially, raises novel and fundamental questions relating to the conduct of administrative agencies. Novel and fundamental questions are also raised by the Court of Appeals' ruling against petitioners based on EPA's assurances that its PSD regulations would not affect mining, when the judicial review provisions of the Act may preclude later judicial review of the Class I designation under EPA's *current* regulatory interpretation, which severely constrains mining. These questions have not been, but should be, decided by this Court. If this Court does not issue a Writ of Certiorari now, the Indian tribe and surface mining petitioners' rights to have EPA consider their objections to the actual impacts of a Class I redesignation may be lost forever. EPA could not later change the designation even if it so desired, unless the Northern Cheyenne them-

selves initiated another redesignation proceeding. Moreover, the Crow Tribe's property rights will have been affected without proper discharge of the fiduciary obligations of the United States.

I. IT IS ARBITRARY AND CAPRICIOUS FOR AN ADMINISTRATIVE AGENCY TO AVOID DEALING WITH PETITIONERS' OBJECTIONS TO A PROPOSED ACTION ON THE THEORY THAT THE ACTION WOULD NOT AFFECT PETITIONERS, WHERE THE AGENCY KNEW WHEN IT APPROVED THE PROPOSAL THAT PETITIONERS MIGHT BE AFFECTED UNDER A STATUTORY AMENDMENT WHICH HAD ALREADY PASSED BOTH HOUSES OF CONGRESS AND WAS AWAITING PRESIDENTIAL SIGNATURE.

A. Petitioners Face Significant Hardship Because a Class I Designation Imposes Immediate Adverse Consequences for Surface Coal Mining Under the 1977 Amendments to the Clean Air Act.

Petitioners' problem with EPA's actions is straightforward. The Agency approved the creation of a Class I area in the midst of their coal reserves and coal mining operations on the theory that this action would not affect petitioners, when EPA has interpreted the 1977 Amendments to constrain seriously petitioners' mining activities.

The Court of Appeals' position that petitioners may not be injured because it is not now clear whether petitioners' coal mines will be subjected to pre-construction review, *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 369-370 (D.C. Cir. 1979), is no answer to petitioners' claim that they will be affected by the Class I designation under EPA's interpretation of the 1977 Amendments. The presence of this Class I area is having, and will continue to have, serious effects on coal mining operations whether or not pre-construction PSD review is required.

Whether or not petitioners' mines are subject to pre-construction review, they will remain subject to the most stringent, Class I, PSD requirements if the Northern Cheyenne redesignation remains in effect. Petitioners are affected, first, because EPA interprets the Act to mean that the PSD increment[2] can be consumed by fugitive dust. 45 Fed. Reg. 52,693 (1980). Class I PSD increments are ceilings on ambient air quality. If the increment is consumed, state permitting of surface mine operations must become more restrictive. For example, once the increment over the Northern Cheyenne Reservation is consumed, under EPA's present regulations Montana must revise its state implementation plan to protect the increment and correct any violation. 40 C.F.R. § 51.24(a), (c) (1980); App. at 82a, 96a. EPA can force the state to adopt the "severe correctives of a rollback in operation or the application of retrofit air pollution control technology" to cure such a violation. *Alabama Power*, 636 F.2d at 363. These effects occur whether or not coal mines are required to obtain pre-construction PSD permits.

Further, whether or not coal mines are required to obtain pre-construction PSD permits, petitioners will be encumbered by the visibility protection requirements of the Montana state implementation plan. Montana's strict visibility rules apply automatically to this particular Class I area, thereby restricting the range of possible uses for nearby lands.[3]

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[2] In a Class I area, the maximum allowable increase of particulate matter over pre-existing levels is 5 micrograms per cubic meter (1 microgram is one-millionth of a gram). 42 U.S.C. § 7473(b)(1) (Supp. III 1979); App. at 48a.

[3] Administrative Rules of Montana § 16.8.822 (1980); [1980] Montana Administrative Register 2402, 2430. Westmoreland Resources objected to this requirement in comments to the Board of Health and Environmental Services of the State of Montana (March 14, 1980). The State's response effectively dismissed this objec-

EPA's interpretation of the 1977 Amendments is that particulate emissions from surface coal mines, whether fugitive or not, will consume the Class I increment. Air quality modeling of surface coal mines completed for the Northern Cheyenne during the redesignation proceeding shows that a mine located within fifteen kilometers of the reservation is likely to consume *all* of the increment for particulate matter. Gelhaus, Northern Cheyenne Reservation Diffusion Modeling Analysis 1. Many of petitioners' properties are well within that distance.

On August 5, 1977, the day EPA approved the redesignation, the 1977 Clean Air Act Amendments had passed Congress and were sitting on President Carter's desk awaiting his signature. The Agency was aware of the potential effects of these Amendments on petitioners since petitioners had pointed them out to EPA. Comments of Westmoreland Resources, Inc. to EPA (May 25, 1977); App. at 107a. Yet, EPA continued to act as though the only impacts on petitioners would be those under its 1974 regulations. EPA's unequivocal statement on August 5 that surface mining "would not" be affected by a redesignation had to be false when made. And, after passage of 1977 Amendments, EPA proceeded to realize petitioner's worst fears by interpreting the Amendments to produce severe adverse consequences for surface coal mining on nearby lands.

B. Since EPA Knew It Was Likely That Petitioners Would be Affected, It Was Required to Consider Their Comments.

Since petitioners were likely to be adversely affected by the Class I redesignation, they had a right to participate in the rulemaking and have EPA consider their

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tion, but the State decided to apply automatically the strict visibility rules in the future only to Class I areas in which visibility is deemed an important value. [1980] Montana Administrative Register at 2430.

comments. 5 U.S.C. § 553 (1976). Petitioners on several occasions had informed EPA of the joint impact of the redesignation and the 1977 Amendments on surface mining, and submitted comments which EPA continually ignored. After Congress passed the 1977 Amendments, EPA had a duty to reconsider its earlier flat statement that coal mining "would not" be affected. Nonetheless, it did not do so. Nor did EPA await enactment of the Amendments as petitioners urged. Rather, EPA rushed through the Class I designation the day after Congressional approval of the bill reported from the Conference Committee and two days before the President signed it into law. EPA approved the redesignation knowing that if it waited a moment longer, the Amendments would become law and petitioners' objections to the redesignation would have to be considered. By acting immediately, petitioners' objections could conveniently be ignored and the redesignation would, by a "grandfather clause," remain effective. 42 U.S.C. § 7472(a) (Supp. III 1979). Unfortunately, petitioners' rights to have their concerns taken into account in an administrative decision affecting their livelihood were trampled in the process. Under these circumstances, it was arbitrary and capricious for EPA not to consider the impacts of the redesignation on surface mining on the theory that petitioners would not be affected by the redesignation.

II. REVIEW OF THIS NOVEL QUESTION OF LAW MUST COME NOW IF PETITIONERS ARE NOT TO RISK LOSING FOREVER THEIR RIGHTS TO HAVE EPA CONSIDER THE EFFECTS OF THE REDESIGNATION ON THEM.

If the Court chooses not to issue a Writ of Certiorari to the Ninth Circuit Court of Appeals, petitioners' opportunities for later review of the Class I redesignation regulation are likely to be foreclosed. Section 307(b)(1) of the Clean Air Act, as amended, *id.* § 7607(b)(1), requires:

> Any petition for review . . . [to] be filed within sixty days from the date notice of such promulgation, approval or action appears in the Federal Register, except that if such petition is based *solely* on grounds arising after such sixtieth day, then any petition for review . . . shall be filed within sixty days after such grounds arise. (emphasis supplied)

Section 307(b)(2), *id.* § 7607(b)(2), prohibits review in a subsequent civil or criminal enforcement proceeding of any final action of the administrator which, like the Class I redesignation, was reviewable under Section 307(b)(1).

Though the constitutionality of this preclusion provision has been questioned, at least in the criminal context, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978) (dissenting opinions of Justices Powell and Stewart), such limitations on reviewability may be relied upon to dismiss, with prejudice, "untimely" petitions for review. Indeed, the Northern Cheyenne argued in the court below that Section 307 bars review of constitutional issues raised by petitioners, and the United States took pains in its argument to avoid any admission that the future review of EPA's approval of the Class I redesignation might not be barred by the 60 day rule.

Because any future petition for review must be based *solely* on grounds arising after the initial sixty-day time for review has passed, it is at least likely that petitioners will not be able to obtain review of the Class I designation at some later time. Since the decided cases give support to the claim that subsequent review may be precluded, a real danger to petitioners has been created.

In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), the court considered late petitions under the Clean Air Act for review of standards of per-

formance for new coal-fired powerplants. The petitioners in *Oljato* claimed to have new information to present. The court stated:

> . . . this case involves a general out-of-time challenge to the validity of an EPA standard, exactly what Congress intended to bar by limiting appeal (absent new information) to within 30 days of the rule's promulgation).

515 F.2d at 659 n.6. Petitioners in *Oljato* were instructed to present their new information to EPA. Their petition for review was barred if the new information did not present grounds adequate for a new evaluation of the standard.

Similarly, a utility filed a late petition for a review of emission standards in the Missouri SIP on the basis of new information concerning technological and economic infeasibility in *Union Electric Co. v. Environmental Pro. Agcy.*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976), *rehearing denied*, 429 U.S. 873. The court found that evidence of technological and economic infeasibility is not "new information" within the meaning of Section 307, and dismissed the petition as untimely filed. Moreover, as noted in Union Electric, 515 F.2d at 209 n.3, in an unreported order the Ninth Circuit, too, has dismissed a petition for review under Section 307 as untimely filed. *Kawasaki Motors Corp. v. Train*, No. 74-1697 (9th Cir. August 9, 1974), *cert. denied*, 420 U.S. 926 (1975).

In short, if EPA's actions are not reversed in this case and remanded for reconsideration, the Act, as amended, will permit EPA to argue that it can never be required to consider the impacts of the Class I redesignation on petitioners. Even worse, EPA is precluded by § 164(c) of the Clean Air Act, 42 U.S.C. § 7474(c) (Supp. III 1979), from redesignating an Indian reservation. Peti-

tioners, including the Crow Tribe, are thus left at the mercy of the Northern Cheyenne.

Avoidance of judicial review in this matter will result in the approval of an arbitrary and capricious action: EPA will have successfully misled the public by alleging that petitioners would not be affected when it had reason to know that petitioners would be harmed. As a consequence, petitioners will be deprived of the only procedural protections they have, and coal development on public or tribal lands will be restrained without consideration of the energy impacts of the redesignation at a time when coal is needed to meet the nation's energy demands. Moreover, a novel and troublesome legal issue requiring an early and definitive ruling by this Court will remain unanswered.

III. THE ENVIRONMENTAL PROTECTION AGENCY BREACHED THE GOVERNMENT'S FIDUCIARY OBLIGATIONS TO THE CROW TRIBE IN APPROVING THE REDESIGNATION OF A CLEAN AIR AREA ADJACENT TO CROW LAND WITHOUT CONSIDERING THE OBJECTIONS OF THE TRIBE, WHERE THE REDESIGNATION WILL ADVERSELY AFFECT THE ABILITY OF THE TRIBE TO MINE COAL ON THEIR LAND.

Even if EPA had no obligation to consider the effect of the all-but-signed 1977 Amendments on the coal mining petitioners, surely the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" imposes on EPA a higher obligation to deal fairly with the Tribe. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). EPA's "conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards." *Id.* at 297. The right of the Crow Tribe to "the absolute and undisturbed use and occupation" of tribal lands is

further provided for by treaty. Treaty with the Crows, 15 Stat. 649 (1868). This right is now abridged because of restrictions placed on coal mining by the redesignation of the Northern Cheyenne Reservation, and EPA allowed this right to be abridged without proper exercise of the government's fiduciary obligations to the Crow Tribe. First, even though the government had a fiduciary duty to protect the Crows, EPA decided to ignore the objections of the Chairman of the Crow Tribe because the technicality of a formal protest from the Tribe was lacking. Second, the Agency used its own misleading assertion that the Tribe would not be affected to justify not listening to the Crow objection.

The government's fiduciary duty to the Crows is like the duty of any fiduciary. *See generally Seminole Nation*, 316 U.S. at 294-97; *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Cramer v. United States*, 261 U.S. 219 (1923); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). In particular, the government cannot carry on activities on land adjacent to a reservation where the activity serves to diminish the value of the reservation as a trust asset and source of income. For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973), diversions of water for a federal dam project reduced, downstream, the level of a lake and thus its value as a trust asset; the water diversion also increased the lake's salinity and impeded upstream spawning, and therefore, decreased the value of the lake as a fishery. Even in the absence of a violation of any specific statute or treaty, the operation of the project was held to violate the government's trust duty to the tribe. Like the dam project in *Pyramid Lake*, the air quality restrictions placed upon the Northern Cheyenne Reservation impede the ability of the Crow Tribe to produce income from their own land and decrease the value of the land as a trust asset.

Under the amended Clean Air Act, the redesignation of the Northern Cheyenne Reservation carries serious consequences for the Crow Tribe in restricting the development of the Crow's coal resources. Yet, neither the Department of the Interior nor EPA satisfied the government's fiduciary duty to the Crow Tribe. To avoid having to weigh the conflicting interests of the Crow and Northern Cheyenne Tribes, the Department of the Interior attempted to shift the government's fiduciary duty to EPA by declining to give its required approval to the redesignation. Letter from James A. Joseph, Undersecretary of the Department of the Interior to Douglas Costle, EPA Administrator (June 23, 1977). App. at 113a.

EPA in turn attempted to free itself from its fiduciary responsibility by using a technicality. *See* 42 Fed. Reg. 40,697 (1977). EPA claimed that because it had received no official protest from the Crow Tribal Council, it could ignore the protests which had been received from the Chairman of the Tribe. *Id.* This failure to review the merits of the redesignation because of a procedural technicality constituted a failure to execute the government's fiduciary duty to the Tribe.

Moreover, the fact that no formal protest was filed is in no small measure attributable to EPA's own misconduct. Had EPA not falsely reassured the Tribe that their surface mining activities would not be affected, the Crow Tribal Council, comprised of all members of the tribe, would have been better able to assess the effect of the redesignation. Indeed, had it not been for EPA's reassurances, the Council might have decided to file a formal protest with the Secretary of the Interior on behalf of the Council as a whole, rather than to act through the Tribal Chairman. It should not be held against the Tribe that no formal protest was filed when a primary reason that the Council took no action was EPA's representations that surface mining would not be affected by the redesig-

nation. As the Ninth Circuit has stated in a non-Indian tribe context, "[t]o say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970). *See also United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973); *United States v. Georgia-Pacific Company*, 421 F.2d 92, 100 (9th Cir. 1970); *Moser v. United States*, 341 U.S. 41 (1951). It is even less worthy of the government to mislead an Indian tribe which looks to the government for protection as its trustee.

Notwithstanding the formal aspects of the protest, the government still had a substantive fiduciary duty to the Tribe. As a result of EPA's failure to respond to the concerns of Undersecretary Joseph of the Department of the Interior and of the Chairman of the Crow Tribe, as the court below found, "the responsibility to exercise [the government's] fiduciary obligations is fairly placed upon the EPA." 645 F.2d at 711. EPA breached this duty by refusing to consider the Tribe's comments in approving the redesignation. The reasoning of the Court of Appeals, that EPA's assertion that there were no effects (even though it knew about the pending 1977 Amendments) somehow freed the Agency from examining the claims of the Crow Tribe, is circular argument at its worst. The Agency's claim that the redesignation would have no effect on the Tribe cannot possibly justify the Agency's failure to consider the Tribe's claim that effects did exist.

Since the Crow and Northern Cheyenne are neighboring tribes, one tribe's clean air preference will necessarily affect the land of the other tribe; that some choice among preferences must be made is understood. EPA can not make this choice in favor of one tribe, however, while refusing even to listen to the arguments of the other tribe. Further, such a choice should not be made based on a

procedural technicality. Herein lies EPA's breach of its fiduciary obligations to the Crows.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be granted. Alternatively, the Court may wish to consider summary reversal of the Court of Appeals and remand to EPA.

Respectfully submitted,

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August 17, 1981

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APPENDIX A

Opinion of U.S. Court of Appeals for the Ninth Circuit

United States Court of Appeals
Ninth Circuit

Nos. 77-3058, 77-3301, 77-3305, 77-3356,
77-3374 and 79-7261

MARCUS L. NANCE *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE *et al.*,
Intervenors.

THERMAL ENERGY, INC. *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE *et al.*,
Intervenors.

AMAX COAL COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE *et al.*,
Intervenors.

CROW INDIAN TRIBE, MONTANA,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE,
Intervenor.

WESTMORELAND RESOURCES,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE,
Intervenor.

WESTMORELAND RESOURCES,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

NORTHERN CHEYENNE TRIBE,
Intervenor.

Argued March 4, 1980

Submitted April 24, 1981

Decided May 18, 1981

Petition for Review of an Action of the Environmental Protection Agency

Before TANG, SCHROEDER and NELSON, Circuit Judges.

NELSON, Circuit Judge:

In this case, petitioners challenge the approval by the Environmental Protection Agency (EPA) of the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards. The major issue presented can be rather simply described. When an agency takes administrative action expressly on the then correct assumption that the action will not affect the rights of various parties, some of whom actively intervene in the proceedings, and immediately after such action becomes final a law is passed which causes the administrative action to have a potential direct effect of the sort it was previously expressly asserted it would not have, is such administrative action thereby rendered arbitrary and capricious or otherwise invalid?

We hold that the EPA's action was not arbitrary or capricious and, therefore, affirm the Agency's approval of the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards. Further, we affirm the denial by the EPA of the petition by Westmoreland Resources to vacate EPA approval of the redesignation and to remand the redesignation question to the Northern Cheyenne for reconsideration. Petitioners assert numerous other flaws in the proceedings which, they contend, require this court to overturn the EPA action. For reasons given below we are compelled to reject these contentions.

Statement of Facts

The facts are particularly crucial in this case because of the importance of the timing of the various events. Pursuant to the decision in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C.1972), *aff'd* 4 Envir.Rep. 1815

(D.C.Cir.), *aff'd by an equally divided court sub. nom. Fri v. Sierra Club*, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973), the EPA promulgated regulations (PSD regulations) designed to prevent the significant deterioration of the air quality in areas cleaner than required by the national secondary air quality standards. 40 C.F.R. § 52.21 (1975). These PSD regulations were published on December 5, 1974. Under these regulations, all areas of the country which had cleaner air than required by the national standards were to be designated as Class I, Class II, or Class III. All clean air areas were initially designated as Class II, under which a moderate amount of deterioration of air quality would be allowed, but procedures were provided by which such areas could be redesignated Class I, under which very little deterioration and hence very little development is allowed, or Class III, under which the quality of the air in the area may deteriorate to the national secondary air quality standards. Specific procedures were provided by which an Indian Tribe governing body could redesignate its reservation from Class II to either Class I or III. 40 C.F.R. § 52.21(c) (1975).

The Tribal Council of the Northern Cheyenne Tribe, Intervenors in this action, decided on May 3, 1976, to request the EPA administrator to reclassify the reservation from Class II to Class I. On May 13, the Tribe advised the EPA of the proposed redesignation, and formally confirmed its proposal by letter dated July 9, 1976. After notifying various federal, state, and local officials, as well as certain citizens' groups, the Tribe began preparation of a report which was to discuss the social, environmental, and economic effects of the proposed redesignation. Volume I of this report, "The Northern Cheyenne Air Quality Redesignation Report and Request," was issued on December 11, 1976, and comprised well over 200 pages. Following distribution of this report to various

agencies and interested parties, and notification of a public hearing on the proposed redesignation, such hearing was held in Lame Deer, Montana, on January 17, 1977. On March 7, 1977, the Tribe formally submitted its proposal for redesignation to the EPA, accompanied by a final report, the hearing transcript, and written comments and responses.

EPA regulations then in force required the agency to take action on such a redesignation proposal within 90 days, 40 C.F.R. § 52.21(c)(3)(vi)(1975), in this case by June 5, 1977. On April 29, 1977, EPA published notice that it intended to approve the redesignation of the Northern Cheyenne Reservation to Class I, and solicited comments on such redesignation through May 31, 1977. On June 10, 1977, the EPA Administrator announced that the time for receiving public comments would be extended until June 30, 1977. On August 5, 1977, the Administrator published his approval of the redesignation, effective immediately, which was accompanied by a 51-page "EPA Support Document" detailing the reasons for such approval. 42 Fed.Reg. 40695 (1977).

Petitioners assert the following grounds for overturning the action of the EPA in this case: (1) The decision of the Cheyenne Tribe to redesignate the reservation as a Class I area and the EPA's subsequent approval of that proposal were arbitrary and capricious insofar as they failed to consider the effects of such redesignation on strip mining; (2) The redesignation was ineffective because of lack of publication prior to the enactment of the 1977 Clean Air Act Amendments, and hence the purported redesignation was not ratified by those amendments; (3) The EPA violated its own regulations in failing to obtain the Secretary of the Interior's approval of the redesignation on behalf of Indian trust lands affected, or, in the alternative, the EPA breached the United States' trust obligations to the Indians; (4) The Cheyenne Tribe sup-

port document was insufficient under the EPA's regulations; (5) The Clean Air Act did not authorize the delegation to Indian Tribes of the power to redesignate their reservations, and if it did so authorize, it was unconstitutional; (6) The redesignation effected a taking of the petitioner's coal mining interests without due process and without just compensation in violation of the fifth amendment to the Constitution; (7) The delegation to the Indian governing bodies of redesignation authority which affected land use outside the reservation area violated the tenth amendment to the Constitution.

Standard of Review

Judicial review of the Administrator's action in this case is governed by section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D). Under this section, we must determine whether the EPA's approval of the redesignation proposal by the Northern Cheyenne is invalid as arbitrary, capricious, or an abuse of discretion, *id.* § 706(2)(A), or unconstitutional, *id.* § 706(2)(B), or in excess of legislative authority, *id.* § 706(2)(C), or procedurally defective, *id.* § 706(2)(D). With respect to review under the "arbitrary and capricious" standard, the reviewing court is limited to deciding whether there has been a clear error of judgment by the agency and whether the agency action was based on a consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1970).

I

Were the Northern Cheyenne's Decision to Redesignate and the EPA's Approval of that Proposal Arbitrary and Capricious

Petitioner's primary complaint is that it was arbitrary and capricious for the Northern Cheyenne Tribe to redesignate its reservation, and subsequently for the EPA

to approve such redesignation, without considering the impact of the redesignation on strip mining in the surrounding area.

It is undisputed that under the regulations in effect at the time the redesignation was proposed, only 19 sources of pollution were subject to permit procedures, and that these sources did not include strip mines. In a meeting sometime before the end of October, 1976, EPA representatives assured the Coordinator of the Northern Cheyenne Research Project that sources not specifically covered by the regulation would not be affected. On October 29, 1976, the Coordinator wrote to the EPA Regional Administrator:

> In a recent meeting with representatives of your office . . ., we were assured that a Class I designation . . . would affect only those point sources listed in the regulations. Simply put, this would mean that point sources not listed, such as mining operations, . . . , etc., are not covered by PSD regulations. This matter has been clouded in our minds for some time and we feel relieved to know the agency's position.

The Regional Administrator responded to a request for written documentation of its position in a letter of November 4, 1976:

> . . . . [The letter of October 29] asks for verification of [the EPA representative's] interpretation of what sources are affected by the PSD regulation. As was indicated verbally, operations such as mining, highway construction, and slash burning are not among the 19 point source categories requiring a permit to construct under the PSD regulation. It should be noted, however, that when one of the 19 PSD sources is under consideration for a permit, the impact of any operation, such as mentioned . . . , coming into existence after January 2, 1975 must be included in evaluating the increment available.

It was repeatedly emphasized both in the December, 1976 "Northern Cheyenne Air Quality Redesignation Report and Request" and at the January, 1977, hearings, as well as in response to written comments, that mining would not be covered by the PSD regulations. In the April 29 publication of the notice of proposed approval of the redesignation the EPA specifically noted that "[s]ince coal mining is not one of the nineteen source categories requiring preconstruction review, and hence would not require a PSD construction permit, redesignation of the Northern Cheyenne Reservation would not directly affect mining either on the reservation or in areas adjacent to the reservation," 42 Fed.Reg. 21820 (1977), and in the August 5, 1977, notice of approval reiterated that "[s]ince strip mines are not subject to the preconstruction review program of the PSD regulation, they would not be directly affected by a redesignation." 42 Fed.Reg. 40697 (1977). It is not disputed that, according to the regulations then in force, the above statements were correct.

Thus, it is clear that the Northern Cheyenne Tribe and the EPA did consider whether strip mining would be affected by the redesignation. The EPA and the Tribe concluded, on the basis of the regulations then in effect, that strip mining would not be affected.

Petitioner's real complaint is with the effect of the redesignation when coupled with the Clean Air Act Amendments of 1977. These amendments added to the sources covered by the preconstruction review program any source emitting in excess of 250 tons of *any* pollutant per year. Section 162(a) of the Amendments provided that any areas designated Class I prior to the enactment of the statute would remain Class I under the statute. 42 U.S.C. § 7472. The Northern Cheyenne Reservation was the only such area. Petitioners and intervenors (other than the Cheyenne Tribe) assert that the EPA and Cheyenne Tribe

should have taken account of the pending legislation in redesignating the reservation and that their failure to do so was arbitrary and capricious. Analysis of this claim requires a chronology of the enactment of the Amendments into law.

The origins of the 1977 Clean Air Act Amendments are to be found in a 1976 bill which was reported by the conference committee but died as a result of a filibuster in the Senate. *See* 122 Cong.Rec. S17568-70, S17573-4. A new bill was introduced in 1977 which passed the House of Representatives on May 26, 1977. On June 10, 1977, the Senate passed an amended version of the bill. *See* 123 Cong.Rec. 18515 (1977). The Conference Committee reported the bill to both the House and the Senate on August 4, 1977, and both houses approved it the same day. 123 Cong.Rec. 26856, 27079 (1977). The EPA approved the redesignation on the following day, August 5. Actual publication of EPA approval took place one week later. The President signed the 1977 Clean Air Act Amendments into law on August 7, 1977.

There are several flaws in the petitioners' theory that the Tribe and the EPA were required to take this legislation into account in considering the proposed redesignation by the Cheyenne Tribe. First, it is far from clear that strip mining will ever be subject to PSD regulation. The PSD permit procedure applies to any source which emits more than 250 tons per year of any pollutant, but there has been considerable dispute as to the meaning of "source" and whether it includes such facilities as strip-mines. Furthermore, it is not clear to what extent the EPA is required or has discretion to consider fugitive emissions as part of this 250 tons. The inclusion of fugitive emissions (i.e. emissions from a facility that escape other than from a point source) in meeting the 250 tons per year threshold is important to this case because fugitive particulate emissions are the primary pollutant re-

leased from surface mines. If fugitive emissions are excluded, it is doubtful that strip mining will be subject to PSD review.

Two recent events make these ambiguities in the legislation manifest. First, the District of Columbia Court of Appeals decided *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C.Cir. 1979). In *Alabama Power*, the court considered, inter alia, whether the EPA may include fugitive emissions in determining whether a source emits more than 250 tons a year of pollutants. Although the court upheld EPA's position that sources of fugitive emissions were encompassed in the PSD provisions, it found that section 302(j) "specifically attaches a rule-making requirement for the inclusion of fugitive emissions" in the calculation whether an emitting facility qualifies as "major". At 369. This rulemaking requirement was found to apply to the "catch-all" provision of section 169(1), which subjects sources producing greater that 250 tons of fugitive emissions per year to PSD permit procedures. *Id.* at 369-370. The effect of *Alabama Power* is to require the EPA to engage in legislative rulemaking before fugitive emissions from strip mining can be considered in determining whether the source emits more than 250 tons per year.

Alabama Power, therefore, lends support to the conclusion that the 1977 Clean Air Act Amendments were indeed ambiguous as to whether strip mining is subject to PSD regulations. This conclusion is buttressed by the EPA's response to the *Alabama Power* decision. The EPA has issued a rule that includes fugitive emissions in determining whether a source is major only for 26 specified types of sources. Strip mining is not one of these 26 sources. 45 Fed.Reg. 52690 (1980). Thus, under present regulations governing fugitive emissions, strip mines are not to be subject to PSD review unless non-fugitive emissions exceed 250 tons per year. *See* 45 Fed.Reg. 52690 (1979).

A second reason why it is unclear that the EPA should have taken the proposed Amendments into account is the uncertainty as to when enactment became sufficiently probable as to require its consideration. The earliest date at which the bill took a fairly final form was upon its reporting by the Conference Committee on August 4, 1977. Even then, the bill might have been subject to further amendment, filibuster, or even defeat. It does not appear either from the record or from the many briefs presented to this court that passage of the Clean Air Act Amendments in their final form was assured at any time significantly before August 4.

On the other hand, the fact remains that EPA approval was not filed until August 5, 1977, the day after both houses of Congress had approved the amendments. Moreover, contrary to usual procedure, the approval was made effective immediately, even though notice was not published until August 11, four days after the President had signed the bill.

The conclusion is thus compelled that on the date the EPA finally approved the redesignation, it knew that the 1977 Clean Air Act Amendments would be passed and signed into law. The question before this court is whether, in light of that knowledge, the EPA's approval of the redesignation was arbitrary and capricious. Two reasons for concluding that it was not were stated above: (1) strip mining is still not subject to PSD regulation under the 1977 Amendments to the Clean Air Act, and (2) the final form of the 1977 Amendments was not assured until the bill was reported from the Conference Committee on August 4, 1977.

A third reason is that the EPA was not certain the Amendments would be passed and signed into law until well after all agency action preliminary to final approval, all comments, and all hearings had occurred, and well

after final agency action was both expected and required by regulations. The decision of the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), makes clear that there must be an end to the period during which the agency must reopen the record to consider new facts. The Court quoted from its earlier opinion in *ICC v. Jersey City*, 332 U.S. 503, 514, 64 S.Ct. 1129, 1134, 88 L.Ed. 1420 (1944):

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

435 U.S. at 554-55, 98 S.Ct. at 1217. This is not to say that pending legislation should never delay or influence the administrative process. But it is for the agency, not for this court, to decide whether the proceeding should be reopened to consider such pending legislation, unless the failure to reconsider is "arbitrary and capricious." *See Northern Lines Merger Cases*, 396 U.S. 491, 520-21, 90 S.Ct. 708, 722, 24 L.Ed.2d 700 (1949); *City of Santa Rosa v. EPA*, 534 F.2d 150, 153 (9th Cir. 1976). All that need be held here is that there the effect of legislation on future agency action is unclear, and passage of the legislation is not assured until after all action preliminary to the agency rendering a final decision has been taken, and the time has passed during which the agency would normally be required to render that final decision,

it was not arbitrary and capricious for the agency to approve a proposed change in air quality standards that did not take account of pending legislation.

II

Was the Redesignation Effectivce on Approval

Petitioners argue that the redesignation was not effective prior to the enactment of the 1977 Clean Air Act Amendments and was, therefore, not ratified by those amendments. This dispute revolves around whether the redesignation could be made effective immediately upon approval, and before actual publication and a 30 day period for notice. Under the Administrative Procedure Act, a substantive rule must be published 30 days before its effective date except "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. § 553(d).

The legislative history of 5 U.S.C. § 553(d) indicates that the primary purpose of the provision was not to encourage prepublication dialogue, but rather to permit petitions for reconsideration and "to 'afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt.'" *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (*quoting* S. Rep.No. 752, 79th Cong., 1st Sess. 15 (1946); H.R. Rep.No.1980, 79th Cong., 2d Sess. 25 (1946)). In determining whether good cause exists, an agency, and a reviewing court, should consider whether the necessity for immediate implementation outweighs any hardship affected persons might experience because of the reduced time to adjust to the new rule. *See id.* at 1105.

In the publication of its approval, the EPA asserted that there was good cause for making the action effective immediately because the EPA had "been holding in abey-

ance a preconstruction permit request pending final action" and "no useful purpose would be served by deferring the effectiveness of this action for thirty days because new applications for construction would have to be evaluated in light of this action in any event." 42 Fed. Reg. 40695 (1977). Petitioners argue that these reasons given by the EPA are insufficient to constitute good cause.

The EPA, however, neglected to mention what was undoubtedly its primary motivation: to assure that the redesignation was effective prior to enactment and thus remained effective under the amendments. This latter purpose may be considered by the court inasmuch as it was implicit in the explicitly stated justification and was additionally, as asserted by the petitioners, obvious from the circumstances. *See Texaco Inc. v. FEA*, 531 F.2d 1071, 1082-83 (Em.App. 1976); *State of California v. Simon*, 504 F.2d 430, 439 (Em.App. 1974). Much time and effort had gone into these redesignation proceedings, and if the redesignation were not effective immediately, the proceedings would have to be undertaken again. Furthermore, immediate effectiveness was necessary to avoid undue prejudice and hardship to the Northern Cheyenne Tribe, since, according to the EPA's own regulations the redesignation should have been approved long before.

Because the petitioners in this case were aware of the proposed redesignation and suffered almost no adverse effects as a result of the noncompliance with the thirty-day requirement, their hardship was outweighed by the Agency's need to put the order into immediate effect. *See Kollett v. Harris*, 619 F.2d 134, 144-45 & n. 15 (1st Cir. 1980) (despite complete noncompliance with 5 U.S.C. § 553(d), good cause was found where regulations were needed to implement new legislation and no prejudice was demonstrated). Thus, good cause existed excusing the failure to comply with 553(d) and the redesignation was effective on the date of publication.

Petitioners cite *Texaco Inc. v. FPC*, 412 F.2d 740 (3rd Cir. 1969) for the proposition that when major legislation is imminent that promises to alter significantly the impact of a proposed administrative rule, the agency should be charged with a duty to utilize the 30-day period to "educate itself" about the combined effect of the rule and the legislation. As Respondents point out, however, *Texaco* can be distinguished because in that case the Federal Power Commission failed to provide notice or a hearing before promulgating an order, 412 F.2d at 742-43. In this case, petitioners suffered no adverse effect because of their failure to receive notice of the final ruling immediately, and indeed had been notified in advance that the redesignation would be effective upon approval. 42 Fed.Reg. 21819 (1977). For these reasons we hold that the EPA could make its decision effective upon approval on August 5, 1977.

III

(a) *Did the EPA violate its own Regulations by Failing to Obtain the Approval of the Secretary of the Interior*

Several intervenors, and in particular the Crow Tribe, argue that the EPA did not follow its own regulations requiring it to obtain approval from the Department of the Interior for actions affecting Indian Trust lands. 40 C.F.R. § 52.21(c)(3)(v) (1975) provides in part:

> Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:
>
> . . . .
>
> (b) Such redesignation is proposed after consultation with the State(s) in which the Indian Reserva-

> tion is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

The Crow contend that the EPA failed to obtain the requisite approval by the Secretary of the Interior. The facts appear to be as follows. On March 21, 1977, two weeks after formal submission of the redesignation proposal, the EPA received a letter from the Northern Cheyenne Agency of the Bureau of Indian Affairs, Department of the Interior, which noted that EPA regulations required approval of the Secretary of the Interior for the proposed redesignation. In that letter, the Superintendent of the Northern Cheyenne Reservation reaffirmed the "Agency's endorsement of the subject Tribal resolution", and added that if such action did not meet the EPA requirements, clarification should be sought from the Office of the Secretary of the Interior. In its April 29, 1977, notice of proposed approval of the redesignation, the EPA noted its doubts that this communication satisfied the procedural requirements and added that it was seeking further clarification before reaching a final decision. 42 Fed.Reg. 21820 (1977).

On May 9, 1977, the Administrator wrote to the Secretary of the Interior requesting such clarification. The letter stated that the EPA was "requesting clarification regarding whether the Tribal Council is proposing the redesignation with the approval of the Secretary of the Interior as required by our regulation." Undersecretary James A. Joseph responded to this letter on June 23, 1977. The key passage follows:

> In the instant case the tribal council sought and received the consent of the Agency Superintendent to forward the proposal to EPA to satisfy the requirement of 40 CFR 52.21 that the Secretary of the Interior approve submission of the proposal. The

> Agency Superintendent has the authority to act in behalf of the Secretary in approval of tribal leases, acceptance of tribal resolutions and ordinances, and approval of matters such as the one at issue, by virtue of a series of delegations of authority from the Secretary. [citations omitted]

We hold the above communications sufficient to meet the requirement that the redesignation be approved by the Secretary of the Interior.

(b) *Did the EPA Fulfill the United States' Trust Obligations to the Crow Tribe*

A separate question is whether the EPA violated the federal government's trust obligations to the Indians. Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards, *United States v. Mason*, 412 U.S. 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942). The Crow Tribe claims that the EPA, in failing to consider the interests of the Crow, neglected these fiduciary obligations. The following facts are relevant to this claim.

In the above mentioned letter of June 23, 1980, Undersecretary of the Interior, James A. Joseph, also informed the EPA of certain concerns of the Crow Tribe regarding the potential effect of a redesignation of the Northern Cheyenne territory.

> The Crow Tribe has raised certain trust concerns regarding the effect on the Crow Reservation of the Northern Cheyenne proposal to redesignate their air quality standards. The United States has a trust responsibility to Indian Tribes, separate and apart from the requirements of 40 CFR 25.21.

> The Crow Tribe is concerned about the effect the Northern Cheyenne redesignation will have on Crow development, and whether they will have to seek Northern Cheyenne approval before implementing development plans. Inasmuch as EPA has the necessary technical expertise to review the impacts on both Tribes as interrelated actions, this Department feels that the United States' obligation to the Tribes would best be satisfied by such review.
>
> If a redesignation is to be made, we would appreciate being informed of the impact and alternatives available to the respective Tribes before final action is taken.

Furthermore, counsel to the Crow Tribe wrote to the Regional Office of the EPA on June 12, 1977, requesting that the EPA "proceed in a trustee or fiduciary relationship with regards to the [Northern Cheyenne] redesignation as to the Crow Tribe." Although no response to this letter is in the record, on August 5, the date the EPA approved the redesignation, the Administrator wrote to the Secretary of the Interior as follows:

> In his June 22, 1977, letter Undersecretary James A. Joseph suggested that EPA review the impacts of the redesignation upon Crow development. In the absence of an official protest from the Crow Tribe, EPA's authority to review these impacts and use the results as criteria for approval or disapproval of the proposed redesignation are limited. However, the Northern Cheyenne did evaluate the potential impacts and, as discussed in the enclosed documentation, the impacts upon Crow development should not be significant.

Two questions are presented by this set of facts. First, was the EPA required to proceed in a Trustee capacity vis a vis the Crow Tribe, and second, if it was so required, did it fulfill that obligation? It is fairly clear

that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942). As a result of the letters from the Undersecretary of the Interior, and the Crow Tribe, and the failure of the EPA to respond to those letters before approving the redesignation, the responsibility to exercise those fiduciary obligations is fairly placed upon the EPA.

So, we must consider whether the EPA fulfilled the United States' fiduciary obligations toward the Crow Tribe. Preliminarily, we note that adequate procedures were provided by the Clean Air Act and the EPA regulations to fulfill this responsibility. The Crow Tribe was consulted by the Northern Cheyenne before redesignation was proposed and it had full opportunity to participate in the public hearing. Moreover, all the Crow Tribe was required to do activate the full panoply of protection against a redesignation that would adversely affect its interest was to lodge an official protest against such redesignation. 40 C.F.R. § 52.21(c)(3)(vi)(e)(1975). This they did not do.

Despite the adequacy of procedural protections, the question remains whether the EPA in substance fulfilled its trust obligations. The primary concern of the Crow from the beginning of the redesignation procedure was clearly the potential impact of such a redesignation on their ability to mine coal. It is in this respect that they now claim that the EPA failed to exercise its trust responsibilities. However, in specifically finding that the redesignation would not, under the law as it stood at that time, have any effect on strip mining, the EPA adequately addressed the Crow's interest in this regard. That the assumption may have turned out as a result of subsequent events to have been wrong does not affect the answer to

the question of whether the fiduciary responsibilities were fulfilled in the first place.

In addition, it must be noted that the Government also has a fiduciary relationship with the Northern Cheyenne Tribe. That tribe has an interest in avoiding further delay before EPA action on the proposed redesignation. In light of these conflicting fiduciary responsibilities and the strong possibility that the Crow tribe would not be prejudiced at all by EPA approval of the redesignation, we cannot say that there was a breach of the fiduciary duty to the Crow.

IV

Was the Cheyenne Tribe Support Document Insufficient under EPA Regulations

Petitioner Westmoreland Resources argues extensively that the PSD Analysis Document prepared by the Tribe in support of the redesignation failed to comply with the regulations of the EPA. Westmoreland argues in particular that the Analysis Document failed to consider the effect of the redesignation on energy development, that it failed to quantify the effect on air quality, that it gave inadequate consideration to the growth anticipated in the area, and that it failed to consider alternatives such as delay. No claim is made that these factors were not considered at all, only that they were not "adequately considered". Thus, the standard of review on appeal is limited to whether the Tribe's consideration of those factors was somehow "arbitrary or capricious." Under that standard of review, the Tribe has met its obligations.

Westmoreland relies heavily on various exacting requirements that have been imposed for the preparation of Environmental Impact Statements (EIS) under the

National Environmental Policy Act (NEPA). Actions under the Clean Air Act, however, are expressly exempted from the requirement of the preparation of an EIS. 15 U.S.C. § 793(c)(1). Furthermore, the Clean Air Act contains a strong presumption in favor of the maintenance of clean air, and the nature of a decision which simply requires that the air quality be maintained at a certain level prevents any exact prediction of its consequences. The Tribe has considered the factors enumerated in EPA regulations, and its choice in favor of the certainty of clean air is a choice supported by the preferences embodied in the Clean Air Act.

V

(a) *Did the EPA Violate the Clean Air Act by Delegating Redesignation Authority to the Indian Governing Bodies*

Certain petitioners argue that the delegation of authority to the Indian governing bodies was a violation of the Clean Air Act, and if it was not a violation then it was unconstitutional. The statutory question was found not ripe for review in *Sierra Club v. EPA*, 540 F.2d 1114, 1139 (D.C.Cir.1976), *vacated and remanded* 434 U.S. 809, 98 S.Ct. 40, 54 L.Ed.2d 66 (1977). Both the EPA and the Tribe argue that this court does not have jurisdiction to review the validity of the redesignation regulations either under the statute or the Constitution. First, they point to section 307(b)(1) of the 1977 Amendments, which requires that petitions for review of any nationally applicable regulations promulgated by the EPA Administrator be filed in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 7607(b)(1). But there is no indication in either the wording of the provision or its legislative history, that it applies to regulations promulgated before the enactment of the 1977 amendments. We think that review

of the pre-1977 regulations may be undertaken in accordance with the provisions then in force. Moreover, the EPA recognizes this by its reliance upon the Sixth Circuit's decision in *Dayton Power & Light Co. v. EPA*, 520 F.2d 703 (6th Cir. 1975). The EPA cites that case for the proposition that only the District of Columbia Circuit has jurisdiction to review the PSD regulations. This seriously misstates the holding. The Sixth Circuit ruled that review of the PSD regulations was governed by the second sentence of then 42 U.S.C. § 1857h-5(b)(1), which provides that review "may be filed only in the United States Court of Appeals for the appropriate circuit." 520 F.2d at 706. The Court then determined that, because of the potential for conflicts between the circuits and the need for uniform national laws, the District of Columbia Circuit was the appropriate circuit to review the PSD regulations, particularly in light of the fact that the regulations were promulgated in response to a decision by that court. 520 F.2d at 708. While the District of Columbia Circuit subsequently upheld the validity of the PSD regulations applicable to the states, it declined to decide the question of the Indian lands redesignation provisions on grounds of ripeness. *Sierra Club v. EPA*, 540 F.2d at 1114. That question is undoubtedly now ripe for adjudication, the actual redesignation of an area by an Indian Tribe being the very issue in this case.* Under *Dayton Power* this Court must decide whether it is the appropriate Court of Appeals to review the PSD regulations applying to Indian Tribes.

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* Judge Schroeder finds this entire case unripe as a general proposition. Contrary to the dissent's assertions, however, this case became ripe at the time the redesignation, which is the only subject of this case, was approved. The crucial issue before us is the correctness of the Agency's behavior during that process of approval. Once that process was complete, no additional events were necessary to enable this court to examine whether the agency properly exercised its authority under the law as it then existed.

It should be noted at the outset that, accepting the ripeness requirement imposed by the D.C. Circuit in *Sierra Club*, the redesignation of the Northern Cheyenne Reservation is the only context in which the pre-1977 regulations applicable to tribal redesignation may ever be challenged. As noted above, this reservation was the only area in the country actually redesignated under those regulations, and thus also the only Indian land so redesignated. So, there will be no opportunity for conflict among the circuits, or for the wasting of judicial resources, the factors which were determinative in *Dayton Power*. Moreover, the only land that has been affected or that can be affected (since the regulations are no longer applicable) is located in this circuit. These facts suggest that this is the appropriate circuit to review this appeal.

Petitioners' argue that the PSD regulations delegating redesignation authority to Indian governing bodies violated the Clean Air Act. Petitioners urge that section 107(a) of the Clean Air Act, 42 U.S.C. § 7407(a), delegated the responsibility to the states for assuring air quality within the entire geographic area comprising the State. Thus they argue that the EPA could not, consistent with the Clean Air Act, authorize Indian governing bodies to control air quality standards in the Indian reservations.

This line of reasoning must be rejected. The EPA instituted PSD regulations pursuant to *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C.1972), *aff'd*, 4 Envir. Rep. 1815 (D.C.Cir.), *aff'd by an equally divided court sub nom. Fri v. Sierra Club*, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973). One question was what procedures were appropriate for Indian tribal lands. The EPA was faced with the choice of granting the states the authority to redesignate Indian lands within their borders of exempting Indian lands from the PSD

regulations, or of allowing the Indian governing bodies the same authority as the states, namely the power to redesignate their lands.

The Indian Tribes have traditionally been regarded as possessing important attributes of sovereignty, and the power of the states to regulate Indians and Indian lands has been sharply curtailed. *See Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658 (9th Cir. 1975). As this Court stated in *Santa Rosa Band of Indians*, "we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power." 532 F.2d at 658. And it is well recognized that "Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975).

Agency interpretations of federal statutes are entitled to great weight. *Brubaker v. Morton*, 500 F.2d 200 (9th Cir. 1974). "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969). Moreover, tribal sovereignty provides "a backdrop against which . . . applicable treaties and statutes must be read." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973). Finally, the EPA regulations allowed this "self-redesignation" only for Indian reservations which had not been subjected to state jurisdiction. 40 C.F.R § 52.21(c)(3)(v) (1975).

The conclusion can be drawn, therefore, that within the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decisionmaking.

Furthermore, while the 1977 Clean Air Act Amendments may not be viewed as "ratifying" the EPA action, they do indicate Congress's view that such Indian authority to redesignate their lands is appropriate. Indeed, in passing the 1977 amendments Congress was well aware that the only area that had seen substantial progress toward redesignation was an Indian Reservation. The Senate Report explicitly states:

> Under existing EPA regulations, Indian tribes are authorized to designate any of their lands as class I areas. If any such designations are approved by EPA prior to the enactment of these amendments such redesignation to class I status shall not be altered by the passage of these amendments. Such a request by the Northern Cheyenne Tribe is pending and may be approved before enactment.

S.Rep.No.95-127, 95th Cong., 1st Sess. 35, *reprinted in* Senate Committee on Environment and Public Works, 3 A Legislative History of the Clean Air Act Amendments of 1977, at 1409 (1977).

Was the Delegation of Redesignation Authority to the Indian Governing Bodies Unconstitutional

Petitioners further contend that if the Clean Air Act is construed to delegate redesignation authority to the

Indian governing bodies, both the Act and the regulations would to that extent be unconstitutional. Petitioners' basic argument is similar to the due process contention discussed below, namely that such a delegation gives the Indian tribes authority to affect land use by non-Indians outside the reservation area. This argument is seriously flawed. First, it hinges on the view that while Indian tribes possess attributes of sovereignty within the reservation, they are mere "private voluntary organizations" with respect to any effects outside the reservation. This seems to be an untenably grudging interpretation of the applicable Supreme Court precedents. On the specific issue of delegation of congressional legislative power, the Supreme Court has stated:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co. v. Ryan*, 293 U.S. 388 [55 S.Ct. 241, 79 L.Ed. 446] (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 [57 S.Ct. 216, 220, 221, 81 L.Ed. 255] (1936). Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 [8 L.Ed. 483] (1832); they are a "separate people" possessing "the power of regulating their internal and social relations . . . ," *United States v. Kagama*, 118 U.S. 375, 381-382 [6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228] (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 [93 S.Ct. 1257, 1262, 36 L.Ed.2d 164] (1973).

United States v. Mazurie, 419 U.S. 544, 556-57, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975). Petitioners agree that

the Indian tribes possess "attributes or sovereignty" over their members and their territory, *id.*, but would distinguish the present case because the redesignation affects land use outside the reservation. Certainly the exercise of sovereignty by the Northern Cheyenne will have extraterritorial effect. But another element must be considered, namely the effect of the land use outside the reservation on the reservation itself. This case involves the "dumping" of pollutants from land outside the reservation onto the reservation. Just as a tribe has the authority to prevent the entrance of non-members onto the reservation, *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 410-11 (9th Cir. 1976), *cf. Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 2085-86, 65 L.Ed.2d 10 (question reserved whether state officials may enter reservation), a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation. We do not, however, decide whether the Indians would possess independent authority to maintain their air quality. "It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority . . ." *United States v. Mazurie*, 419 U.S. at 557, 95 S.Ct. at 717.

We note further that while the Clean Air Act permits delegation of redesignation authority to the Indian tribes, the EPA maintains certain checks on the exercise of that authority. EPA regulations require approval of a proposed reclassification by the EPA Administrator; the tribes must prepare a report discussing the social, environmental, and economic effects of the redesignation; a public hearing must be held on the Report; and consultation is required with states and tribes that border the reservation of the tribe proposing the redesignation.

VI

The Fifth Amendment Takings Claim

Petitioners also contend that the redesignation by the Northern Cheyenne Tribe constituted a taking without due process and without just compensation in violation of the fifth amendment of the United States Constitution. These claims are not ripe for adjudication.

First, it is not yet established that strip mines are indeed subject to PSD permit procedures under the 1977 amendments. On the contrary, it appears at the very least that the EPA will have to engage in rule-making in order to subject the strip mines to those provisions, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), and the regulations recently proposed by EPA would not result in requiring PSD permits for strip mines. Since any future application of the PSD regulations to strip mines would be based on agency action other than the redesignation under the pre-1977 regulations, the 30-day time limit for appealing that redesignation would not preclude the assertion of petitioners' fifth amendment claims.

Furthermore, there is no evidence in the record that even if full Class I restrictions are applied to petitioner's coal mining properties that the petitioners will be unable to engage in any profitable coal mining whatsoever. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The mere regulation of the use of property, even if it results in the diminution of its value and profitability does not constitute a taking within the meaning of the fifth amendment. *See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Thus even assuming that strip mines are subject to the PSD permit procedure, the takings issue is not ripe for adjudication until the effect of the redesignation

on the coal mining interests of the petitioners has been determined by the EPA.

Petitioners' claim that the redesignation violated due process because it was for the "private" benefit of the Cheyenne Tribe is without merit. Not only is it well recognized that the Indian tribes possess attributes of sovereignty in many respects comparable to those of the states, *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), but Congress has recognized that clean air, wherever located, is in the *public* interest. To the extent that the redesignation limits polluting activities outside the area of the Northern Cheyenne reservation, a benefit is also conferred upon people living in those areas. It is noteworthy in this respect that the affected states, Wyoming and Montana, have chosen not to challenge the EPA's action. Petitioners' argument that the Indians have been allowed to regulate the use of property outside the reservation area, in violation of due process requirements, is also without merit insofar as it assumes an inherent right on their part to deposit pollutants on the property of the Indians. It was Congress and the EPA, not the Indian tribes, that decided in the first instance that the interest in clean air generally was superior to that interest represented by the polluting activity.

VII

The Tenth Amendment Claim

Petitioners also claim that allowing the Indians to redesignate their lands and, in so doing, to affect the use to which lands outside the reservation may be put is a violation of the tenth amendment. While the standing of petitioners to assert this claim, insofar as the tenth amendment is designed to protect the interest of the states qua states, may be seriously questioned, this claim is so patently without merit that the standing question can be left for another day. (*See* Note, *Assuming Juris-*

diction Arguendo: Rationale and Limits of Hypothetical Jurisdiction, 127 U.Pa.L.Rev. 712, 733-34 (1979)).

Basically, petitioners argue that allowing redesignation by Indian tribes to have extraterritorial effects unconstitutionally limits the state's interest in planning and enforcing land use policies. This view implies that Congress is without authority to regulate directly the polluting activities of private parties. Were the court to adopt the view urged by petitioners, it is hard to see what federal activity under the commerce clause would be permitted. Here, the states have not been required to take any affirmative action, *Cf. Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977), nor has the state's ability to regulate its own governmental affairs or allocate its own resources been affected. *Cf. National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). The power to allow private citizens to engage in strip mining is hardly one of those "functions essential to separate and independent existence." 426 U.S. at 845, 96 S.Ct. at 2471. Indeed, the Supreme Court in *National League of Cities* drew an express distinction between regulations aimed at private enterprises and those aimed at states:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

426 U.S. at 845, 96 S.Ct. at 2471.

Other Claims

Petitioner Westmoreland Resources additionally appeals the EPA's denial of its petition to vacate EPA

approval of the redesignation and to remand the redesignation question to the Northern Cheyenne for reconsideration. Westmoreland argues that the EPA's refusal to vacate was an abuse of its discretion because the original approval was based upon an incorrect finding that the redesignation proposal would not affect coal mining. This is essentially the same argument we rejected above. Because the EPA's action in approving the redesignation proposal was not arbitrary and capricious, and because petitioner fails to demonstrate that the original approval was based on a clearly incorrect finding, the Administrator's denial of Westmoreland's petition cannot be found an abuse of discretion.

The administrative process cannot provide for the constant reopening of the record to consider new facts, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460 (1978), and it is for the agency, not this court to determine when such reopening is appropriate, unless the failure to reconsider can be characterized an abuse of discretion. *See City of Santa Rosa v. EPA*, 534 F.2d 150, 153 (9th Cir. 1976). Moreover Westmoreland can request the Northern Cheyenne to apply for a further reclassification back to Class II standards in light of the adverse effect of the 1977 Amendments on strip mining, if there is such an effect. We therefore affirm the EPA's denial of Westmoreland's petition to vacate.

Conclusion

For the reasons given above we hold that the EPA's action in approving the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards was not arbitrary or capricious. We similarly reject the numerous other arguments which Petitioners contend require us to overturn the redesignation. The Agency's action in this case is, therefore, affirmed.

SCHROEDER, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision to decide this case.

The majority opinion covers a far ranging and boulder strewn field of issues. It decides, for example, that the EPA acted properly when it dispensed with requirements of the Administrative Procedure Act, 5 U.S.C. § 553(d)(3) in order to avoid having to consider the redesignation under the 1977 Clean Air Act Amendments which were then awaiting the President's signature. That conclusion seems dubious at best.

An important reason advanced by the majority for reaching that conclusion is that the EPA has not yet promulgated regulations under the amended act which require strip mines to have PSD permits, and the redesignation thus has not had any measurable adverse impact upon the petitioners in this case, all of whom represent strip mining interests. That reason is precisely the reason I believe the Court should reach no decision in this case and dismiss on the ground that the case is not ripe.

As the Supreme Court has summarized:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) (footnote omitted). *See also Toilet Goods Association v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967) in which the Court declined to review a final agency action stating "this is not a situation in which primary conduct is affected . . . ." *Id.* at 165, 87 S.Ct. at 1525.

One leading authority has compiled a catalog of problems which courts avoid when they decide that a case is not ripe. For example, issues presented may prove irrelevant to the actual conflict which develops; sensitive constitutional issues may be better avoided; there may be dangers of intruding into administrative programs before agency views have crystalized; premature decisions may lead to ill-advised decisions. 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3532 (1975). This case illustrates all of those problems.

This Court has recently held that a case was not ripe for decision when a potential to regulate had never been exercised, when the challenger had not been denied any privilege and had never been prosecuted, and when there was real doubt as to whether there would ever be an assertion of power. *International Society for Krishna Consciousness v. Kleppe*, 592 F.2d 529 (9th Cir. 1979). In the environmental field, the Seventh Circuit has held that a challenge to an EPA designation of "air quality maintenance areas" was not ripe for review where the challengers were "not required to do anything nor to refrain from doing anything" as a result of the designation. *Bethlehem Steel v. EPA*, 536 F.2d 156, 162 (7th Cir. 1976). The D.C. Circuit cited that case when it also rejected, on ripeness grounds, a challenge to EPA action. *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 673 n.1 (D.C. Cir. 1978). *See also* the extensive discussion of ripeness which this Court has approved in *American Petroleum Institute v. Knecht*, 456 F.Supp.

889 (D.C. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979), stressing the importance of considering the extent of the hardship on the parties if a case is not decided. In both *Bethlehem Steel* and *Diamond*, a claim of economic harm in the nature of long range planning needs was asserted as necessitating a prompt decision. The Courts both rejected such claims as insufficient for ripeness purposes. The claim of harm here is even more attenuated.

This Court requested supplemental briefs in this case specifically directed to the question of ripeness. In those briefs, the Northern Cheyenne Tribe takes the position that the case is not ripe because there is no threatened or existing harm to strip mining interests as a result of the challenged designation. The government and the petitioners agree that strip mines are not now subject to PSD permit requirements and it is unlikely that they ever will be. The only claim of possible harm they present is a contention that fugitive emissions of the strip mines would be considered in a general assessment of Class I air quality deterioration, and that violation of those overall standards might trigger increased state controls under the State Implementation Plan. The nature of such controls or their effect on these petitioners cannot be known at this time. No such controls are asserted to be imminent. The State of Montana is not a party here, and the existence of an absent party whose presence might affect the resolution of issues is still another factor militating against deciding this case. If we further consider that the authorization of appropriations for the Clean Air Act itself will expire in 1981, 42 U.S.C. § 7404(c), thus necessitating a reconsideration of the Act in its entirety by Congress this year, the unnecessary character of today's decision becomes almost palpable. *See generally* the Clean Air Act Debate, 126 Cong.Rec. S14792 (daily ed. Nov. 21, 1980).

Petitioners have expressed fear that the provisions of the Act, requiring a petition for review to be filed within 60 days after final agency action, would leave them without the possibility of future recourse to the courts. 42 U.S.C. § 7607(b)(1) and (2). However, that section does not ring down a final curtain on review of agency action after 60 days. The section provides:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1).

I would construe this clause as permitting the petitioners to seek review in this Court when and if future events establish grounds to create a meaningful controversy.

APPENDIX B

EPA Decision to Approve Redesignation
42 Fed. Reg. 40,695 (1977)

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 775-7]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Montana: Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The purpose of this action is to approve the March 7, 1977, request of the Northern Cheyenne Tribal Council to redesignate the Northern Cheyenne Indian Reservation to Class I under EPA's regulations for prevention of significant air quality deterioration (PSD). Class I applies to areas in which practically any charge in air quality would be considered significant. On April 29, 1977, EPA published a notice announcing EPA's tentative decision to approve the proposed redesignation and soliciting written public comments. Neither the comments nor EPA's detailed review surfaced any deficiencies in the proposal. Thus, EPA is approving the redesignation of the reservation to Class I as a revision to the Montana implementation plan.

EFFECTIVE DATE: August 5, 1977.

ADDRESSES: Copies of the Northern Cheyenne analysis and EPA support document are available at: U.S. Environmental Protection Agency, Region VIII, Office of Public Affairs, Suite 900, 1860 Lincoln Street, Denver, Colorado 80295.

U.S. Environmental Protection Agency, Room 2922, 401 M Street SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:

Louis W. Johnson, Chief, Planning & Operations Section, Air Programs Branch, U.S. Environmental Protection Agency, Region VIII, 1860 Lincoln Street, Denver, Colorado 80295. 303-837-3711.

SUPPLEMENTARY INFORMATION: On December 5, 1974 (39 FR 42510), EPA promulgated regulations for the prevention of significant air quality deterioration (PSD). The intent of these regulations is to prevent deterioration of existing air quality, particularly in areas currently considered to be pristine. The regulations provide for three basic classifications applicable to all lands of the United States. Associated with each classification are increments which represent the increase in air pollutant concentration that would be considered significant. Class I applies to areas in which practically any change in air quality would be considered significant; Class II applies to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applies to those areas in which deterioration up to the national standard would be considered insignificant. Under the regulations, all areas of the country were initially designated Class II. The regulations allow States, Federal Land Managers, and Indian Governing Bodies to reclassify areas under their jurisdiction to accommodate the social, economic, and environmental needs and the desires of the local population.

The PSD regulation is implemented through a preconstruction review program affecting nineteen categories of major sources. Such sources cannot receive permission to construct if their emissions, together with other emission changes since January 1, 1975, would violate the applicable increment.

On March 7, 1977, EPA received an official proposal from the Northern Cheyenne Tribal Council to redesignate the Northern Cheyenne Indian Reservation to Class I. The request was accompanied by an analysis of the reasons for the proposed redesignation and the associated social, economic, and environmental impacts as well as the regional and national impacts of the proposed redesignation.

The Northern Cheyenne's primary reasons for proposing redesignation were stated as follows:

A desire to preserve the lifestyle of the reservation and the existing culture without disruption caused by further air quality deterioration.

Adverse effects on human health caused by further degradation of air quality. The Northern Cheyenne cite the existing high rate of respiratory illness among residents of the reservation.

Impacts of further air quality degradation on the growth of vegetation, especially the ponderosa pine forest.

Potential impacts on visibility of further air quality degradation.

On April 29, 1977 (42 FR 21819), EPA published a notice in the FEDERAL REGISTER announcing receipt of the proposal and soliciting public comment on the request with respect to the review criteria set forth in 40 CFR 52.21. On June 10, 1977 (42 FR 29937), in response to requests by interested parties, EPA extended that public comment period until June 30, 1977.

The April 29, 1977, notice presented a brief discussion of the requirements for redesignation and the efforts of the Northern Cheyenne to comply with those requirements. That discussion raised one potential cause for disapproval of the request—the requirement that an Indian Governing Body propose the redesignation with the approval of the Secretary of Interior. As indicated in the notice, EPA had received a communication from an official of the Bureau of Indian Affairs. EPA was uncertain of the authority of the BIA official and requested a clarification from the Office of the Secretary of Interior. The Secretary's office responded that the BIA official had been delegated authority to give Secretarial approval in such matters. Thus, EPA has determined that this requirement was met by the Northern Cheyenne Tribal Council.

COMMENTS

There were 62 comments submitted to EPA. While it is not practical to discuss every comment here, the major points are discussed below. The comments are discussed in more detail in the document entitled "EPA Support Document for Northern Cheyenne Redesignation Request," referenced at the end of this preamble.

MORE PUBLIC INPUT

Some argued that EPA should hold extensive public hearings and solicit additional public comment before taking final approval action on the redesignation. The PSD regulation, which has been upheld in "Sierra Club *v.* EPA." 540 F.2d 1114 (D.C. Cir. 1976),[1] contains pro-

[1] The Supreme Court agreed to review this decision on April 4, 1977. EPA strongly supports the validity of the PSD regulations and will fully implement and enforce them unless EPA's position is overturned in the Supreme Court. Several other U.S. Courts of Appeal have agreed with the D.C. Circuit; none have disagreed. Moreover, Congress has on several occasions rejected attempts to delete PSD authority from the Clean Air Act.

cedures providing full opportunity for public hearings and comment. Such procedures have been complied with in this case.

The Northern Cheyenne held a public hearing on January 17, 1977, in Lame Deer, Montana, which is accessible to people living in the area affected by the redesignation. They also held the record open following the hearing to permit further public comments. There was a great amount of interest and comments (both pro and con) were submitted and integrated into the Northern Cheyenne's final analysis.

EPA also provided its own period for public comment on the Northern Cheyenne proposal and even extended the period an additional 30 days. Because the regulation limits EPA's scope of review on this proposal to determining whether procedural requirements were complied with and whether the Tribe arbitrarily or capriciously disregarded certain factors, nothing would be gained by further prolonging the comment period. In fact, doing so would be unfair to the Northern Cheyenne, who have completed the lengthy task of complying with all of the redesignation procedures and are now entitled to a resolution of their request.

Montana Laws Adequate

There were several comments that the Montana Sitting Act and/or the Montana environmental rules are adequate to protect the environment. Montana's rules and regulations contain no provisions for prevention of significant deterioration. Therefore, in December 1974, EPA, pursuant to a court decision, disapproved the State's implementation plan and promulgated the PSD regulations. As noted above, these regulations have been upheld by the D.C. Circuit Court of Appeals.

EXISTING LIFE STYLE ALTERED

Many expressed concern that farming activities on or near the reservation would be adversely affected or that the redesignation could hinder the ways of life of people holding land. Another individual stated that he could not understand why Class I designation was needed in an area not currently experiencing air pollution problems. The intent of the PSD regulations is to maintain as nearly as practicable the existing air quality in designated areas where local priorities so require. As such, they are effective in clean air areas—not in areas that are violating ambient standards. They are implemented through a new source review program to restrict the emissions from certain major industrial sources if they would cause significant air quality degradation. The regulation would have no effect upon the operation of existing facilities or upon minor sources. Since farming is not a major source of industrial pollution, farming activities would also not be affected. Thus, the PSD regulation and the redesignation would not inhibit farming activities or alter anyone's existing way of life. On the contrary, Class I designation would more effectively maintain the existing way of life than any other designation.

EIS REQUIRED BY NEPA

Some argued that EPA must comply with the requirements of the National Environmental Policy Act (NEPA) prior to any decision on the Northern Cheyenne redesignation request. Congress, however, has made its intentions abundantly clear in this regard: "No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." 15 U.S.C.A. 793(c)(1). In any event, the Northern Cheyenne analysis of the social, environmental and economic effects of the redesig-

nation, the extensive public comments both to the tribe and EPA, and the agency's own evaluation of all this information, adequately accomplish the goals and purposes of NEPA.

COLSTRIP 3 & 4 AFFECTED

Several comments expressed concern that a Class I designation would prevent the construction of electric power plant units known as Colstrip 3 & 4, which are planned for a site near the Northern Cheyenne reservation. The commentors argued that the result would be a shortage of power in Montana and the Pacific Northwest. While dispersion modeling presented in the analysis and performed by EPA indicates that the units, as proposed, would violate the Class I increments for SO_2 on the reservation, the redesignation would not necessarily prevent their construction. EPA's analysis indicates that approximately 90 percent capture of the SO_2 emissions from the new units would reduce emissions sufficiently to avoid violation of the increment. Therefore, redesignation of the reservation should require additional control efforts which are achievable by currently available control technology for the proposed new units.

REVERSIBILITY

One individual expressed doubts that the Class I designation could be reversed. The Northern Cheyenne could, if their priorities were to change in the future, seek redesignation back to Class II or Class III through the same procedures implemented in their effort to reclassify to Class I. However, as was pointed out in the Northern Cheyenne's analysis, Class II and Class III designations are not nearly so reversible. Once the air quality on the reservation is deteriorated, it would be extremely difficult to renew it to its original quality.

National Impacts

Many argued that the redesignation would have significant impacts on national interests, specifically by restricting energy production. As discussed in EPA's proposal of April 29, there are two major concerns related to energy production; (a) strip mining of coal, and (b) conversion of coal to electric power or gas. Since strip mines are not subject to the preconstruction review program of the PSD regulation, they would not be directly affected by a redesignation. On the other hand, coal conversion facilities would be affected. The Northern Cheyenne analyzed the impacts of various development scenarios and reported that large facilities located within ten to thirty miles of the reservation border might violate the Class I increment. Therefore, the planning of such facilities would have to be done more carefully with regard to location and, pollution control. However, the redesignation would not prevent the construction of new facilities in the general area. Given the relatively small area of the reservation (700 square miles), the redesignation should not significantly affect national energy interests.

Regional Impacts

There were comments that the potential restrictions upon energy development may affect regional interests. The potential regional impacts primarily involve energy development on the Crow Reservation, which is adjacent to the western border of the Northern Cheyenne Reservation. EPA received comments from eleven members of the Crow Tribe and from the law offices of Lynaugh and Fitzgerald, which serves as designated legal counsel for the Crow Tribe.

In discussing comments related to the potential impacts of the redesignation upon the Crow Tribe it should be noted that the Crow Tribal Constitution and By-laws provide that only the Crow Tribal Council which consists of

all voting members of the Crow Tribe, can determine a Tribal position or empower a representative to speak for the Tribe on a matter such as redesignation. There has been no indication to date that the Tribal Council has developed a position on the Northern Cheyenne redesignation proposal or empowered anyone to represent the Council in this matter. While some tribal members and their legal counsel have expressed opposition to the redesignation because of its potential impact upon development of coal reserves, several members of the Crow Tribe have also expressed support for the redesignation.

As discussed previously, coal mining in the eastern portion of the Crow Reservation would be under no additional restriction as a result of this reclassification. However, coal conversion facilities could be restricted depending upon size, spacing, and control technology. The exact nature of the restriction is difficult to determine since final development plans have not been made and the only proposed development to date is for coal mines producing coal for export.

Approval

Section 52.21(c)(3)(vi) states that the Administrator will approve a request for redesignation by an Indian Governing Body unless (1) the procedural requirements previously discussed have not been followed; or (2) the Indian Governing Body has arbitrarily and capriciously disregarded the considerations of growth, environmental, and economic effects, or national or regional interests. Both the Northern Cheyenne analysis and the EPA support document show that the Northern Cheyenne have fully complied with all of the procedural requirements, and that the Northern Cheyenne have considered all of the relevant factors and have not arbitrarily and capriciously disregarded them.

EPA therefore approves the Northern Cheyenne proposal and herein promulgates a revision to the Montana

State Implementation Plan which redesignates the Northern Cheyenne Indian Reservation as Class I. Additional support for this approval can be found in the document entitled "EPA Support Document for Northern Cheyenne Redesignation Request," which is part of this rulemaking action. This document is available for inspection and copying at the addresses listed in the introduction to this notice.

This action is effective immediately. There is good cause for making the action immediately effective since EPA has been holding in abeyance a preconstruction permit request pending final action on the redesignation. Furthermore, no useful purpose would be served by deferring the effectiveness of this action for thirty days because new applications for construction would have to be evaluated in light of this action in any event.

(Secs. 110, 301, Clean Air Act, as amended (42 U.S.C. 1857c-[illegible] 1857g).)

Dated: August 5, 1977.

DOUGLAS M. COSTLE,
Administrator.

Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart BB—Montana

In § 52.1382, paragraph (c) is added as follows:

§ 52.1382 Significant deterioration of air quality.

* * * * *

(c) (1) Except as set forth in this paragraph, all areas of Montana are designated Class II.

(2) The Northern Cheyenne Indian Reservation is designated Class I.

[FR Doc. 77-23111 Filed 8-5-77; 5:16 pm]

APPENDIX C

Clean Air Act as Amended

42 U.S.C. §§ 7470-7479 (Supp. III 1979) provide, in pertinent part:

PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

SUBPART I—CLEAN AIR

§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air)[2], not withstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this sec-

[1] So in original. Probably should read "anticipated".

[2] So in original. Section was enacted without an opening parenthesis.

tion applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

(July 14, 1955, ch. 360, title I, § 160, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731.)

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) identified pursuant to section 7407(d)(1)(D) or (E) of this title.

(July 14, 1955, ch. 360, title I, § 161, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731.)

§ 7472. Initial classifications.

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size.

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part.

(b) Areas designated as class II

All areas in such State identified pursuant to section 7407(d)(1)(D) or (E) of this title which are not estab-

lished as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

(July 14, 1955, ch. 360, title I, § 162, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731, and amended Nov. 16, 1977, Pub. L. 95-190. § 14(a)(40), 91 Stat. 1401.)

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. 791a et seq.] over the emissions from such sources before the effective date of such plan.

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the

concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

(July 14, 1955, ch. 360, title I, § 163, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 732, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(41), 91 Stat. 1401.)

§ 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed re-

designation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472 (a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves.

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within [1] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian Tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State

[1] So in original. Probably should read "with".

or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

(July 14, 1955, ch. 360, title I, § 164, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 733, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(42), (43), 91 Stat. 1402.)

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such

source, alternatives thereto, control technology requirements, and other appropriate considerations:

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter.

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum

allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2) (A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emisisons from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C) (i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants.

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D) (i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C) (iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his

concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE
(In micrograms per cubic meter)

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the

analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones.

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region.

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

(July 14, 1955, ch. 360, title I, § 165, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 735, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(44)-(51), 91 Stat. 1402.)

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2) (A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by

Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, ch. 360, title I, § 169, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 740, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(54), 91 Stat. 1402.)

§ 7607. Administrative proceedings and judicial review

* * * * *

Judicial review

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) any de-

termination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX D

EPA PSD Regulations in Effect at Time of Redesignation

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40 C.F.R. § 52.21 (1977) provides, in pertinent part:

§ 52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portion of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2) (i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following

increases in pollutant concentration occurring since January 1, 1975:

Area designations

Pollutant	Class I ($\mu g/m^3$)	Class II ($\mu g/m^3$)
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (*1*) growth anticipated in the area, (*2*) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (*3*) any impacts of such proposed redesignation upon regional or national interests.

(*e*) The redesignation is proposed after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(iii) Except as provided in paragraph (c) (3) (iv) of this section, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of this subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to

the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (1) that the requirements of subdivisions (ii) and (iii) of this

subparagraph have not been complied with, (2) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) (*d*) of this paragraph, or (3) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) (*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (*2*) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) (*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances con-

siderations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(*f*) The requirements of paragraph (c) (3) (vi) (*a*) (3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of paragraph (c) (3) (vi) (*a*) (3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975 except as specifically provided below. A source which is modified, but does not increase the

amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

(2) No owner or operator shall commence construction or modification of a source subject to this para-

graph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, of other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2) (ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d) (2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4) (i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(ii) Whenever any new or modified source is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submited by the owner or operator, a copy of the Administrator's preliminary deter-

mination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his rea-

sons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e) (1) (ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accord-

ance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e) (1) (ii) (*c*) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State

or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

[39 FR 42514, Dec. 5, 1974; 40 FR 2602, Jan. 16, 1975, as amended at 40 FR 24535, June 9, 1975; 40 FR 25005, June 12, 1975; 40 FR 42012, Sept. 10, 1975]

APPENDIX E

EPA PSD Regulations Currently in Effect

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40 C.F.R. § 51.24 (1980), as amended by 45 Fed. Reg. 52.729-33, provides, in pertinent part:

§ 51.24 Prevention of significant deterioration of air quality.

(a)(1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) *Plan Revisions.* If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) shall review the expected impact to the applicable increment(s).

(3) *Required plan revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be

revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) *Plan assessment.* The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) *Public participation.* Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.4.

(6) *Amendments.* (i) Any state required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph, shall adopt and submit such plan revision to the Administrator for approval before May 7, 1981.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted defini-

tion is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1) (i) "Major stationary source" means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b) (1) (i) (*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under

paragraph (b)(1) as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds shall be considered major for ozone.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of any order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be

prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24;

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*g*) Any change in ownership at a stationary source.

(3) (i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not

relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant

under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

(12) "Best available control technology" means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any

proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the reviewing authority determines that technological or economic limitations on the applications of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13) (i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b) (13) (ii);

(*b*) The allowable emissions of major stationary sources which commenced construction before Janu-

ary 6, 1975, but were not in operation by the applicable baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emission from any major stationary source on which construction commenced after January 6, 1975; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the baseline date.

(14) (i) "Baseline date" means the earliest date after August 7, 1977, that:

(*a*) A major stationary source or major modification subject to 40 CFR 52.21 submits a complete application under that section; or

(*b*) A major stationary source or major modification subject to regulations approved pursuant to 40 CFR 51.24 submits a complete application under such regulations.

(ii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(i)(D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24; and

(*b*) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would

be a significant net emissions increase of the pollutant.

(15) (i) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d) (1) (D) or (E) of the Act in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

(ii) Area redesignations under section 107(d) (1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact or any major stationary source or major modification which:

(*a*) Establishes a baseline date; or

(*b*) Is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24, and would be constructed in the same state as the state proposing the redesignation.

(16) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition.

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the

Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(18) "Secondary emissions" means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purposes of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas the stationary source modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21) (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)-(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) "Complete" means, in reference to an application for a permit, that the application contains all the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

(23) (i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

(24) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) "Low terrain" means any area other than high terrain.

(27) "Indian Reservation" means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(c) *Ambient air increments.* The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
CLASS I	
Particulate matter:	
Annual geometric mean	5
24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
CLASS II	
Particulate matter:	
Annual geometric mean	19
24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512

CLASS III

Particulate matter:	
Annual geometric mean	37
24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

(e) *Restrictions on area classifications.* The plan shall provide that—

(1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

(i) International parks,

(ii) National wilderness areas which exceed 5,000 acres in size.

(iii) National memorial parks which exceed 5,000 acres in size, and

(iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) *Exclusions from increment consumption.* (1) the plan may provide that the following concentrations shall be excluded in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from

using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide or particulate matter from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4).

(2) If the plan provides that the concentrations to which paragraph (f)(1)(i) or (ii) refers shall be excluded, it shall also provide that no exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) refers or the plan to which paragraph (f)(1)(ii) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.24 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v), the Administrator may approve a plan revision that:

(i) Specifies the time over which the temporary emissions increase of sulfur dioxide or particulate matter would occur. Such time is not to exceed two years in duration unless a longer time is approved by the Administrator;

(ii) Specifies that the time period for excluding certain contributions in accordance with paragraph (f) (4) (i) is not renewable;

(iii) Allows no emissions increase from a statutory source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Requires limitations to be in effect the end of the time period specified in accordance with paragraph (f) (4) (i) which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

(g) *Redesignation.* (1) The plan shall provide that all areas of the State (except as otherwise provided under paragraph (e) of this section) shall be designated either Class I, Class II, or Class III. Any designation other than Class II shall be subject to the redesignation procedures of this paragraph. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a revision to the applicable State implementation plan.

(2) The plan may provide that the State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II: *Provided*, That:

(i) At least one public hearing has been held in accordance with procedures established in § 51.4.

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(3) The plan may provide that any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of provisions established in accordance with paragraph (g) (2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation (including resolutions where appropriate) concurring in the redesignation;

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification subject to provisions established in accordance with paragraph (1) of this section which could receive a permit only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available, insofar as was practicable, for public inspection prior to any public hearing on redesignation of any area as Class III.

(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided*, That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under para-

graphs (g)(2), (g)(3)(iii), and (g)(3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed area designation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

* * * * *

(i) *Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions.*

(1) The plan shall provide that no major stationary source or major modification shall begin actual construction unless, as a minimum, requirements equivalent to those contained in paragraphs (j) through (r) of this section have been met.

(2) The plan shall provide that the requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section would otherwise allow.

(3) The plan shall provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area which is designated as attainment or unclassifiable under section 107(a)(1)(D) or (E) of the Act; and

(4) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a particular major stationary source or major modification if:

(i) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(iii) The source or modification is a portable stationary source which has previously received a permit under requirements equivalent to those contained in paragraphs (j) through (r) of this section, if:

(*a*) The source proposes to relocate and emissions of the source at the new location would be temporary; and

(*b*) The emissions from the source would not exceed its allowable emissions; and

(*c*) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(*d*) Reasonable notice is given to the reviewing authority prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the reviewing authority not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the reviewing authority.

APPENDIX F

Westmoreland Comment to EPA

[LOGO]

WESTMORELAND RESOURCES
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Post Office Box 1883
Billings, Montana 59103

(406) 248-7803

CHARLES E. BRINLEY
President

May 25, 1977

Mr. Louis W. Johnson, Chief
Planning and Operations Section
Air Programs Branch
USEPA Region VIII
1860 Lincoln Street
Denver, CO 80295

Gentlemen:

RE: Comments on the Redesignation of the Northern Cheyenne Indian Reservation to Class I under the Prevention of Significant Deterioration Regulations.

Westmoreland Resources is unable to determine the effect of this redesignation on its operations because of the different approaches being taken by the House and Senate on the Prevention of Significant Deterioration. Differing versions of Amendments to the Clean Air Act are now before both Houses of Congress. Since the effect could be considerable depending on how these legislative differences are resolved, the Company is being denied due process by having to comment at this point in time.

DISCUSSION

Westmoreland Resources presently operates a strip mining operation under leases from the Crow Indian Tribe. It has received all necessary state and federal operating permits. At the nearest point, the boundary of its lease area is approximately 5.1 miles from the boundary of the Northern Cheyenne Indian Reservation. The proposed redesignation of the Northern Cheynne Indian Reservation to Class I was published in the *Federal Register* on April 29, 1977, 42 FR 21819 (April 29, 1977). This proposed redesignation was developed pursuant to EPA's Prevention of Significant Deterioration (PSD) Regulations, 40 CFR § 52.21. Once an area is classified as Class 1 under these regulations, new sources of pollution that fall within one of the nineteen listed industrial categories must apply for and receive a permit before commencing construction in the designated area or in an area that will affect the designated area. The state, federal land manager, or Indian Tribal Council then reviews the data submitted with the permit application to determine whether or not the new facility will violate the applicable air quality increments. A permit application for a new or modified facility in a Class 1 area would be denied if its particulate pollution would cause the annual geometric mean to increase more than five micrograms per cubic meter or would cause the 24 hour maximum to increase more than ten micrograms per cubic meter. Any owner or operator who constructs or modifies a source that falls within the nineteen categories of industrial facilities and who does so without a permit would be subject to criminal penalties under Section 113 of the Clean Air Act.

As the *Federal Register* notice of the proposed redesignation points out, present and future coal stripping operations would not be covered by the "presently existing" Prevention of Significant Deterioration Regulations, 42

FR 21820. The only one of the nineteen categories of industrial facilities that impacts on mining operations is No. 2, Coal Cleaning Plants. One purpose of a coal cleaning plant is to remove pyritic sulfur from coal thereby decreasing the sulfur content of a coal so it satisfies sulfur limitations applicable to the point source where it is to be burned. Since Westmoreland Resources is mining a .73% sulfur coal, the construction of a coal cleaning plant may be necessary to market the coal to new sources.

If the House version of the Clean Air Act becomes law, the effect on Westmoreland Resources will be considerable. The House version "indicates that adequately demonstrated technology is to be the basis of the standard, not merely reliance on the use of untreated fuels". House Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1977, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 11 (May 12, 1977). Any coal producer wishing to supply coal to a new power plant not using a scrubber would have to have precombustion coal cleaning. Therefore, the PSD requirement for a permit for new coal cleaning plants may have much greater market significance if the House version of § 111 becomes law.

The House amendments also broaden the category of sources to be reviewed. All new or modified major stationary sources will have to obtain a state permit prior to construction. A major stationary source is defined as a direct pollution source with the design capacity to emit a hundred tons or more of particulates per year. H.R. Rep. No. 95-294, *supra*, 9. Thus, if the Company plans to expand production by purchasing an additional dragline, it may have to get a permit under the House amendments.

In response to criticism from the mining industry that this would hobble western coal production, the Committee included proposed Section 160(f)(1)(E) which provides

for an exemption for "naturally occurring particulate matter" at the discretion of the governor. According to the Committee:

> "The Governor could exclude these dirt particulates from counting against the allowable increment. It is evident from the FEA-ERT study that the increments proposed by the Committee should not unduly restrict the siting and operation of even very large new strip mines, if the states choose to classify a proposed mine site so as to allow mining operations. Therefore, the Committee bill will not preclude the opening of new mines. Rather, the ultimate decision on whether to class the lands or to grant a permit to a proposed strip mine will rest with the state, just as it does with other proposed sources." H.R. Rep. No. 95-294, *supra*, 166.

The House version of the Clean Air Act would preclude the Company from marketing its product to new fuel burning sources without precombustion coal cleaning. It would also subject new or modified mining operations to new sources review unless the Governor of Montana took action to exempt naturally occurring particulates.

Under the saving provision of the House version of the Clean Air Act Amendments, all existing designations would remain in full force with the new requirements of the Act becoming directly applicable to them. H.R. Rep. No. 95-294, *supra*, 402 at (ii). Thus, the redesignation to Class 1 may retroactively subject the Company to extremely burdensome requirements if the House version of the Clean Air Act Amendments becomes law. Substantial problems also exist for the Company under the Senate version of these Amendments which differs substantially from the House version.

The Senate version adds a new subsection, 110(g). This new subsection is intended by the Senate Committee

to "completely define the requirements of the Clean Air Act to prevent significant deterioration". Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1977, S. Rep. No. 95-127, 95th Cong., 1st Sess. 30 (1977). All "major emitting facilities" must have a permit before commencing construction. A "major emitting facility" is one which falls within one of twenty-eight industrial categories listed in the bill. Coal cleaning plants but not actual mining operations would be affected by the Senate version of the bill. The Senate version significantly strengthens the role of Indian tribes in the PSD process. Indian tribes are given the same power as states. S. Rep. No. 95-127, *supra*, 34. Even if the applicant demonstrates that the Class 1 increments would not be exceeded, the federal land manager or Indian tribe may nevertheless demonstrate that the emissions would still have an unacceptable adverse effect on air quality related values. The state would then have to refuse to issue the permit. According to the Senate amendments, "the federal land manager (Indian tribe) holds a powerful tool. He is required to protect federal lands from deterioration of an established value, even when Class 1 numbers are not exceeded". S. Rep. No. 95-127, *supra*, 36. Under the Senate version of the PSD language, an Indian tribe could defeat permit issuance even if Class 1 increments will not be exceeded. The Senate version also provides that previously approved Class 1 designations will remain in effect. The Committee Report specifically refers to the Northern Cheyenne Tribe's pending request. S. Rep. No. 95-127, *supra*, 35.

A most serious situation could occur for the Company if a "worst case" combination of the House and Senate versions were to emerge as the Conference Committee Report. This "worst case" would be a combination of the House provisions requiring precombustion coal cleaning for new fuel burning sources and the House provision for the review of all sources emitting more than 100 tons

a year with the Senate's increased authority for Indian tribes and the Senate authority to refuse a permit even if the Class 1 increments are not exceeded. From the foregoing, it is possible to see how the Company might be seriously affected by the redesignation but is not now in a position to gauge the extent of the effect.

When the rights of any person will be substantially affected by legislation which is pending at the time administrative action is ongoing, there is ample precedent to suggest that final administrative action should be stayed. In the Blue Ridge Dam case, the Federal Power Commission stayed the effective date of its license pending Congressional action to include the new river in the list of Wild and Scenic Rivers. See FPC Opinion No. 698, (June 14, 1974); *State of North Carolina v. FPC*, 533 F.2d 702 (1976). A similar example of administrative restraint exists in the deferral of action by the Immigration and Naturalization Service where legislation was pending to change the status of Western Hemisphere aliens married to residents. *Noel v. Green*, 376 P. Supp. 1085, (1974).

CONCLUSION

Westmoreland Resources is being denied due process because approval of the Northern Cheyenne Class 1 Redesignation is proceeding while legislation is pending in Congress which would rewrite the PSD Program and which will be made retroactively applicable to any existing Class 1 Designation. EPA should delay action on the Cheyenne Class 1 Redesignation until Congress has acted so that all affected persons may gauge the extent of the effect and provide the Agency with their comments.

Sincerely,

/s/ Charles E. Brinley
CHARLES E. BRINLEY

dlm

APPENDIX G

Letter from James Joseph to Douglas Costle

UNITED STATES DEPARTMENT
OF THE INTERIOR

[SEAL]

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Jun. 23, 1977

Honorable Douglas M. Costle
Administrator
U. S. Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Costle:

Your agency has raised the question of whether, in the Department of Interior's view, the action of the Agency Superintendent of the Northern Cheyenne Agency, Bureau of Indian Affairs, satisfies the requirement found in 40 CFR 52.21, that the Secretary of Interior authorize the Northern Cheyenne Tribe to submit its proposal to redesignate reservation air quality standards to EPA for review and approval or disapproval.

Initially we note that the original correspondence between the Agency Superintendent and the Tribe appears to have created some confusion in that it was unclear whether the Agency Superintendent was endorsing the Northern Cheyenne proposal or authorizing its submission. We believe the recent correspondence between the Tribe and the Agency Superintendent clears this issue, and that the Superintendent is satisfied that the Tribe has made an informed decision.

In the instant case the tribal council sought and received the consent of the Agency Superintendent to forward the proposal to EPA to satisfy the requirement of 40 CFR 52.21 that the Secretary of Interior approve submission of the proposal. The Agency Superintendent has the authority to act in behalf of the Secretary ir approval of tribal leases, acceptance of tribal resolutions and ordinances, and approval of matters such as the one at issue, by virtue of a series of delegations of authority from the Secretary: 230 IAM 1, 10 BIAM 2.1, 10 BIAM 3.1, and 10 BIAM 4.1.

The Crow Tribe has raised certain trust concerns regarding the effect on the Crow Reservation of the Northern Cheyenne proposal to redesignate their air quality standards. The United States has a trust responsibility to Indian Tribes, separate and apart from the requirements of 40 CFR 25.21.

The Crow Tribe is concerned about the effect the Northern Cheyenne redesignation will have on Crow development, and whether they will have to seek Northern Cheyenne approval before implementing development plans.

Inasmuch as EPA has the necessary technical expertise to review the impacts on both Tribes as interrelated actions, this Department feels that the United States' obligations to the Tribes would best be satisfied by such review.

If a redesignation is to be made, we would appreciate being informed of the impact and alternatives available to the respective Tribes before the final action is taken.

Sincerely,

/s/ James A. Joseph
Secretary

bcc: Secretary's Files
Secretary's R.F. (2)
DUS/Keller
Billings Area Director

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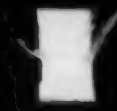
Opposition



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No. 81-312

In the Supreme Court of the United States

OCTOBER TERM, 1981

CROW TRIBE OF INDIANS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency acted arbitrarily and capriciously in approving a redesignation of air quality classification for the Northern Cheyenne Reservation pursuant to Prevention of Significant Deterioration (PSD) regulations then in force under the Clean Air Act, when enactment of amendments to the Act that could change the effect of the redesignation was expected.

2. Whether the judicial review provisions of the Clean Air Act require that the court below remand the redesignation to EPA for consideration of the effect of the 1977 Amendments to the Clean Air Act, when that question has already been considered by the agency and the court.

3. Whether EPA's approval of the redesignation violated the federal government's fiduciary duty to the Crow Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 645 F.2d 701. The final decisions of the Administrator of the Environmental Protection Agency are published at 42 Fed. Reg. 40695 (1977) (Pet. App. 36a-45a) and 44 Fed. Reg. 27741 (1979).

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1981. The petition for a writ of certiorari was filed on August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *EPA's "Old" PSD Regulations.* Under the Clean Air Act as amended in 1970, 42 U.S.C. (1970 ed.) 1857 *et seq.*, EPA established a program to prevent significant deterioration (PSD) of air quality in those areas of the Nation where the air is cleaner than required by the National Ambient Air Quality Standards. The program was governed by regulations originally promulgated in 1974 (hereinafter "old PSD regulations"). 39 Fed. Reg. 42510 (1974), codified as amended at 40 C.F.R. 52.21 (1977). Under the old PSD regulations, clean-air areas of the Nation were to be designated as either Class I, Class II, or Class III, depending on the amount of air quality deterioration to be allowed. The regulations established permissible "increments," by which the concentration of various pollutants could be increased without exceeding the maximum permissible concentration of such pollutants for each relevant air quality class. 40 C.F.R. 52.21(c) (1977). Class I allowed the smallest amount of deterioration (40 C.F.R. 52.21(c)(2)(iii) (1977)) and was designed for areas in which preserving existing air quality was a high priority.

EPA initially designated all areas Class II, but reserved the right to redesignate areas to either Class I or Class III, in accordance with procedures set forth at 40 C.F.R. 52.21(c)(3) (1977). Under that provision, EPA acted on proposals made by the States, by Federal Land Managers in the case of federal lands, and by Indian governing bodies in the case of reservations of self-governing Indian tribes. The regulations specified the required procedures in detail: the proposing Indian governing body had to make available a written discussion of the reasons for the redesignation, notify other affected persons,

including other Indian governing bodies, hold a public hearing, and consider the effects of the redesignation on the area, the region, and the Nation. EPA was required to approve any such proposal within 90 days if the proponent had complied with these procedures and given appropriate consideration to the impacts of the redesignation. 40 C.F.R. 52.21(c)(3)(vi)(*c*) (1977).[1]

The air quality in every designated area (whether Class I, II, or III) was protected by a new source review process under 40 C.F.R. 52.21(d) (1977). Nineteen enumerated types of industrial plants, such as power plants and coal cleaning plants, were required to obtain PSD permits. A permit was to be based on a determination that the plant would not contribute to a violation of the applicable increments. *Ibid.* Strip mines were not among the 19 enumerated types of plants, and thus were not governed by the regulations.

2. *The Redesignation Proceedings.* On May 13, 1976, pursuant to a Tribal Council Resolution, the Northern Cheyenne Tribe advised EPA that it would propose to redesignate its reservation to Class I under the PSD regulations (Pet. App. 4a).[2] The Tribe then gave notice of its redesignation proposal to affected persons, including the Crow Tribe and state and local governments. On December 11, 1976, the Tribe issued a 250-page analysis entitled "Northern Cheyenne Air Quality Redesignation Report and Request," which discussed, *inter alia*, the social, en-

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[1] Where the Reservation lands to be redesignated were held in trust, approval of the Department of the Interior was also required. 40 C.F.R. 52.21(c)(3)(v)(*b*) (1977).

[2] No other area in the Nation was ever redesignated or proposed for redesignation under the old PSD regulations (Pet. App. 8a).

vironmental, and economic effects of the proposed redesignation on the reservation and its impact on regional and national interests (*id.* at 4a, 38a). Copies of the Report were distributed to all interested parties for comment, including the Crow Tribe (*id.* at 4a-5a, 19a). On January 17, 1977, following due notice, the Northern Cheyenne Tribe held a public hearing on its proposal (*id.* at 5a). On March 7, 1977, the Tribe submitted a formal redesignation request to EPA, together with the original report, transcripts of the hearing, and responses to and analyses of all oral and written comments (*ibid.*). The Tribe's principal stated aims in seeking the redesignation were to prevent adverse effects on human health, to protect vegetation and visibility, and to preserve the tribal lifestyle on the reservation (*id.* at 38a).

On April 29, 1977, the EPA Administrator proposed to approve the Class I redesignation and solicited public comments, to be submitted within 30 days, by May 31, 1977. 42 Fed. Reg. 21819 (1977). The notice stated that the redesignation would be effective immediately when approved. In the notice, the Administrator explained that the redesignation would have no direct effect on strip mining because coal mining was not subject to the preconstruction review requirements of existing PSD regulations. *Id.* at 21820. On June 10, 1977, over the objection of counsel for the Northern Cheyenne Tribe (R. 237),[3] EPA announced that it was extending the public comment period until June 30, 1977, in part because of a request for an extension which it had received from a member of the Crow Tribe (Pet. App. 38a; 42 Fed. Reg. 29937 (1977)).

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[3] "R." refers to the record filed with the court of appeals in this case.

The Department of the Interior was consulted on the redesignation, as required by 40 C.F.R. 52.21(c)(3)(v)(*b*) (1977), and it concurred on March 21, 1977 (R. 91-92), and subsequently reconfirmed its concurrence (R. 442-443). On August 5, 1977, nearly two months after the expiration of the 90 days within which he was required to act on the proposal (see 40 C.F.R. 52.21(c)(3)(vi)(*c*) (1977)), the Administrator took final action approving the redesignation in a 51-page "EPA Support Document," which detailed the reasons for his approval (42 Fed. Reg. 40695 (1977)). He repeated his conclusion that the redesignation would not directly affect surface coal mining because coal mining was not one of the 19 enumerated categories requiring a PSD construction permit, and he also noted that, while members of the Crow Tribe expressed various views, the Tribe itself did not object to the redesignation (*id.* at 40697).[4] The Administrator found good cause to make the redesignation approval effective immediately, since final action on the redesignation was two months overdue, and since he had already announced that the redesignation would be effective immediately upon approval (*ibid.*).

3. *The 1977 Amendments.* On August 7, 1977, the President signed into law the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. (Supp. III) 7401 *et seq.* ("1977 Amendments"). The 1977 Amendments establish a PSD program generally modeled on the old PSD regulations. Under the new PSD program, as under

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[4] Had the Crow Tribe, Montana, or Wyoming objected, EPA would have balanced the impacts of the redesignation de novo in acting on the proposal. 40 C.F.R. 52.21(c)(3)(vi)(*e*) (1977).

the old PSD regulations, areas are to be designated as Class I, Class II, or Class III. For Class I areas, the allowable increments of pollutants did not change (42 U.S.C. (Supp. III), 7473(b)(1)), but the effective environmental restrictions were eased, in that the Amendments allow the increments to be exceeded during one air pollution measuring period each year. 42 U.S.C. (Supp. III) 7473(a).

The 1977 Amendments also provide that any area that was redesignated Class I under the old PSD regulations will remain Class I under the new PSD program unless that area is redesignated again (*i.e.*, to Class II or Class III) pursuant to certain procedures set forth in the Amendments. 42 U.S.C. (Supp. III) 7472(a), 7474. Under those procedures the appropriate authority (in this case, the Northern Cheyenne Tribe) may redesignate an area after notice and public hearing. EPA may disapprove redesignations and resolve disputes among tribes and States regarding redesignations. 42 U.S.C. (Supp. III) 7474(b)(2), (e).[5]

The Act now imposes requirements in addition to the permitting of sources in the 19 specified source categories. These new requirements potentially affect strip mines. For instance, the Act requires that States take such measures as are necessary to prevent applicable PSD increments from being violated, and such measures may be applied to strip mines. 40 C.F.R. 51.24(a)(3), (a)(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 361-364, 368-370 (D.C. Cir. 1979); 45 Fed. Reg. 52693 (1980).[6]

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[5] EPA's regulations implementing these provisions are published at 40 C.F.R. 52.21(u).

[6] Strip mines do not presently require PSD permits, however. The 1977 Amendments require any new "major" stationary source that would be located in a clean air area to

4. *The Adversarial Proceedings Below.* Petitioners filed petitions for review in the court of appeals, and petitioner Westmoreland Resources subsequently petitioned EPA to vacate the Class I redesignation on the ground that the agency had improperly failed to take account of the effect of the 1977 Amendments on strip mines. EPA denied that petition (44 Fed. Reg. 27741 (1979)), and Westmoreland Resources sought review of that denial (Pet. App. 3a, 31a).

The review petitions were consolidated and the court of appeals upheld both EPA's approval of the Northern Cheyenne's Class I redesignation and EPA's denial of petitioner Westmoreland Resources' petition to vacate that approval and remand to the Northern Cheyenne for reconsideration in light of the enactment of the 1977 Amendments.

The court of appeals concluded (Pet. App. 11a-13a) that EPA's final approval of the Class I redesignation on August 5, 1977, pursuant to then existing PSD regulations, was not arbitrary and

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have a PSD permit (42 U.S.C. (Supp. III) 7475(a)), and "major" sources include *any* stationary source having the potential to emit 250 tons per year or more of a pollutant regulated under the Act (42 U.S.C. (Supp. III) 7479(1)). But potential "fugitive" emissions from a source (*i.e.*, those not emitted through a stack) may not be included in calculations for determining whether a source is "major" unless EPA has undertaken rulemaking to establish that inclusion of such emissions is appropriate in determining the emissions potential of that source. 42 U.S.C. (Supp. III) 7602(j); *Alabama Power Co.* v. *Costle, supra,* 636 F.2d at 368-370. EPA has yet to conduct that rulemaking for strip mines, and since strip mines do not generally have enough non-fugitive emissions to make them "major," they do not at present require PSD permits. Because EPA might someday undertake the necessary rulemaking, strip mines are potentially subject to PSD permitting.

capricious since the passage of the 1977 Amendments in their final form (mandating new regulations that might affect strip mining) could not have been predicted with any assurance until August 4, 1977,[7] and since, at that point, all hearings and other prerequisites for final agency action on the redesignation had been taken and a decision was already overdue under applicable rules. Moreover, as the court noted (*id.* at 9a-10a), even passage of the 1977 Amendments did not automatically subject strip mining to PSD permitting requirements (see note 6, *supra*). The court found authority in this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 554-555 (1978), for concluding that EPA did not act arbitrarily and capriciously in refusing to reopen the administrative record and prolong the administrative process in order to consider possible effects of the 1977 Amendments on the redesignation decision (Pet. App. 11a, 12a, 31a).

The court also rejected petitioners' contention that EPA breached the government's trust responsibility to the Crow Tribe (Pet. App. 17a-20a), and rejected certain other challenges not here at issue (*id.* at 5a-6a, 13a-17a, 20a-30a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court. Because the Northern Cheyenne Reservation is the only area in the Nation redesignated or proposed for redesignation under the old PSD regulations, the case is *sui generis* and presents no issue of general

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[7] In 1976 a similar bill had been reported out of conference committee and then died as a result of a filibuster (Pet. App. 9a).

importance.[8] Because the court of appeals properly resolved the essentially fact-bound questions presented, further review by this Court is not warranted.

1.a. Petitioners contend that it was arbitrary and capricious for EPA to evaluate the redesignation proposal under the PSD regulations then in effect, when legislation that would substantially revise the PSD program was pending. Petitioners are thus challenging the agency's adherence to its own regulations. Under those regulations strip mines were not subject to PSD requirements and thus not a factor in Class I redesignation decisions; and under those regulations EPA was required to approve a redesignation proposal if it met all applicable procedural and substantive requirements (40 C.F.R. 52.21(c)(3)(vi) (1977)). EPA found that the Northern Cheyenne's proposal met all applicable requirements; that finding was affirmed by the court below (Pet. App. 15a-17a, 20a-21a) and it is not challenged here.

Petitioners cite no authority, and we are aware of none, for the proposition that it is arbitrary and capricious for an agency to follow its regulations when it appears likely that a statute requiring amendment of those regulations will be enacted. Indeed, the general rule that an agency is bound by its existing regulations is directly to the contrary. *E.g.*, *Service* v. *Dulles*, 354 U.S. 363, 380 (1957). Congress from time to time amends the statutes that agencies administer, but as the court below held

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[8] The authorization of appropriations for the current Clean Air Act expires in 1981. 42 U.S.C. (Supp. III) 7626(a). When the Act is reauthorized, it may contain changes that will ease current environmental restrictions on petitioners' projected surface coal mining operations.

(Pet. App. 6a-13a), it was within EPA's discretion to take action under the law as it then stood. As the court noted, by the time enactment of the 1977 Amendments appeared certain, all required hearings had been held, all comments had been received, and the Administrator's decision was nearly two months overdue. It is noteworthy that it was in part at the request of officials of petitioner Crow Tribe, and over the objection of the Northern Cheyenne Tribe, that the Administrator extended the time of his final approval, in derogation of EPA regulations. The observation of this Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 554-555, that there comes a time when an agency is no longer under an obligation to reopen the record to consider new facts is thus especially applicable in this case.

Moreover, as the court of appeals observed, it is also uncertain that this redesignation will significantly affect petitioners' projected coal strip mining under the 1977 Amendments. EPA has yet to undertake the rulemaking that would be necessary to make fugitive dust emissions from strip mines count against the 250 tons of pollutants per year that a coal strip mine is allowed to release into the atmosphere. In addition, the 1977 Amendments liberalized the Class I standards by allowing the permissible pollution increments to be exceeded during one air pollution measuring period each year (see page 6, *supra*).

b. EPA correctly rejected the argument of petitioner Westmoreland Resources that the redesignation should be vacated in light of the 1977 Amendments. 44 Fed. Reg. 27741 (1979). The Amendments clearly provide that any area redesignated as Class I under the original PSD regulations should be a Class I area under the new PSD program created

by the Amendments. 42 U.S.C. (Supp. III) 7472(a). The legislative history, moreover, reveals that Congress specifically contemplated that the Northern Cheyenne Reservation might become a Class I area under this provision. The Senate report on the forerunner of this provision states (S. Rep. No. 95-127, 95th Cong., 1st Sess. 35 (1977)):

> Under existing EPA regulations, Indian tribes are authorized to designate any of their lands as class I areas. If any such designations are approved by EPA prior to the enactment of these amendments, such redesignation to class I status shall not be altered by the passage of these amendments. Such a request by the Northern Cheyenne Tribe is pending and may be approved before enactment.

The House report indicates a similar intent as to Class I redesignations generally. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 143 (1977).

Under the 1977 Amendments, petitioners' proper course is not to seek vacation by EPA of the original Class I redesignation, but rather to petition the Northern Cheyenne Tribe for a new redesignation of the clean air area, since in the case of reservations appertaining to federally recognized Indian tribes, such redesignations must be initiated by the appropriate Indian governing body. 42 U.S.C. (Supp. III) 7474(c).[9]

2. Petitioners contend (Pet. 10-13) that this Court should grant review because the review-preclusion provisions of the Clean Air Act as amended,

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[9] Whether petitioners could obtain review of an adverse tribal decision on such a petition is a question that should await factual development in the Tribe's proceedings. See *United States* v. *Mazurie*, 419 U.S. 544, 558 n.12 (1975).

42 U.S.C. (Supp. III) 7607(b), deprive them of opportunities for review of the Class I redesignation in light of its impact on their strip mine activities. The contention is without merit. Petitioners have not been deprived of a judicial forum in which to attack the redesignation on the basis of its possible effects on their activities; rather, they are dissatisfied with the court's rejection of their arguments.

To be sure, the statute requires that any petition for review of agency action be filed within 60 days from the date of the Federal Register notice of that action (42 U.S.C. (Supp. III) 7607(b)(1)), and, accordingly, petitioners may not later file a review petition raising anew their challenges to EPA's approval of the Class I redesignation and its refusal to vacate that approval.[10] But that is not a reason for granting certiorari in this case. Petitioners' position is no different from that of any person for whom denial of certiorari and application of principles of res judicata will operate as a bar to future litigation of issues raised by his petition. Their argument with respect to the review-preclusion provisions is, in fact, little more than a restatement of

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[10] 42 U.S.C. (Supp. III) 7607(b)(1) provides in pertinent part (emphasis added):

> * * * Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, *except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.*

A following subsection, 42 U.S.C. (Supp. III) 7607(b)(2), provides that action with respect to which review could have been obtained under subsection (b)(1) is not subject to judicial review in civil or criminal proceedings for enforcement.

their argument, discussed in Point 1 above, that the court of appeals should have reversed EPA's actions on the grounds that EPA had unlawfully refused to consider the effects of the 1977 Amendments, together with the redesignation decision, on the strip mining of land in the vicinity of the Northern Cheyenne Reservation.[11]

3. Petitioners contend (Pet. 13-17) that EPA breached the government's fiduciary duty to the Crow Tribe by failing adequately to consider the effects of the Class I redesignation on them. Petitioners concede (Pet. 16), as they must, that the government owed such a duty both to the Northern Cheyenne Tribe, which sought to protect the air over its lands from increased pollution, and the Crow Tribe, which sought to minimize any potential interferences with its ability to engage in profitable strip mining of its lands. The court of appeals correctly held (Pet. App. 17a-20a) that, given its determination that EPA acted correctly in evaluating the redesignation proposal under existing regulations (see Point 1 above) and the abundant procedural protections extended to the Crow Tribe in the course of the redesignation proceedings, the government did not violate its duty to the Crow.

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[11] As the court of appeals noted, however (Pet. App. 28a-29a), petitioners' time for seeking review of any takings claims will not start to run until the agency takes action with demonstrable adverse effects on their beneficial use of property that is or may be strip mined. Hence, the court's refusal, on ripeness grounds, to adjudicate the takings claims does not preclude petitioners from seeking relief in the future from any agency action linked to the Class I redesignation that so severely affects their property interests as to rise to the level of a taking of property within the meaning of the Fifth Amendment.

The PSD regulations under which EPA acted required that the redesignation proposal take account of the impact on neighboring tribes, that it be approved only after notice to such tribes and an opportunity to comment, and that if any affected tribe objected to the redesignation, EPA be required to consider the redesignation de novo with respect to its impact on that tribe.

Here, as noted (pages 3-4, *supra*), the Northern Cheyenne gave public notice to interested parties, including the Crow Tribe, held a public meeting, at which the Crow were free to participate, and thoroughly analyzed the effects of the proposed redesignation, including the effects upon the Crow Tribe and upon possible coal mining off the Northern Cheyenne Reservation. EPA found that analysis to be adequate, but it extended the public comment period on its proposed approval of the redesignation by a month, over the objection of the Northern Cheyenne, in part at the request of members of the Crow Tribe. EPA delayed final approval by two months. The agency considered comments from members of the Crow Tribe under the appropriate arbitrary and capricious standard of review for passing on the Northern Cheyenne's reclassification petition. 40 C.F.R. 52.21(c)(3)(vi)(*c*)(2) (1977); 42 Fed. Reg. 40697 (1977).[12] However, since the Crow Tribe did not object as a tribe (Pet. App. 19a),[13] EPA did

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[12] EPA also obtained the concurrence of the Department of the Interior as required by 40 C.F.R. 52.21(c)(3)(v)(*b*) (1977).

[13] As the Administrator noted (42 Fed. Reg. 40697 (1977)): "the Crow Tribal Constitution and By-laws provide that only the Crow Tribal Council, which consists of all voting members of the Crow Tribe, can determine a tribal position or empower

not weigh the objection of Tribal members de novo. 40 C.F.R. 52.21(c)(3)(vi)(*e*) (1977). The court below, therefore, correctly held that the agency did not breach the federal trust responsibility to the Crow Tribe in approving the redesignation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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a representative to speak for the Tribe on a matter such as redesignation." EPA's regulations also required such tribal council action. 40 C.F.R. 52.21(c)(3)(vi)(*e*) (1977). In general, an Indian Tribe may speak only through its governing body. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 318-320 (1927). As petitioners concede (Pet. 15), the Crow Tribal Council never passed a resolution or empowered any person to speak for the Tribe on this matter.

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